Supreme Court, U.S.
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No. _____
10-85

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In The
Supreme Court of the United States

BARRY SCHEUR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Barry Scheur has been totally blind since birth. At trial the parties used or entered into evidence thousands of pages of exhibits, witness statements and grand jury testimony – much of which he was never able to access or read before or during trial. The first question presented is:

Whether denying a totally blind defendant a reasonable opportunity to access the evidence against him and review it with his counsel deprives him of constitutional rights including due process, effective assistance of counsel, and confrontation.

2. None of the defendants testified. In rebuttal closing the prosecutor gestured toward them, raised his voice and said "Not one of these defendants has stepped up and admitted they did anything wrong." The jury deliberated for over two days, stated that they were having difficulty reaching consensus, rendered a split verdict and sent a note out with it stating that "we do hope (and some of us pray) that we have not done wrong by the defendants, the people of the United States, or this court." The second question presented is:

Whether a prosecutor's comment on defendants' decisions not to testify may be deemed harmless by the appellate court when the trial court found that this was a close jury case in which the prosecutor's comment may have been prejudicial.

PARTIES TO THE PROCEEDING

In addition to the petitioner, co-defendant Robert McMillan was an appellant in the Fifth Circuit but is not a party to this petition. Rodney Moyer was a defendant in the district court but entered into a plea agreement just before trial. Danette Bruno was acquitted at trial. Moyer and Bruno were not parties on appeal, or in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Barry Scheur respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 600 F.3d 434. Appendix, *infra*, pp. 1-48.

JURISDICTION

The Fifth Circuit issued its decision on March 11, 2010 and entered an order denying petitioner's motion for rehearing on April 12, 2010. Appendix, *infra*, pp. 49-50. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATEMENT OF THE CASE

1. Relevant Facts

Barry Scheur is 59 years old and has been blind since birth. Nevertheless, he graduated from Tufts University and Yale Law School. Over 30 years, he emerged as an innovative national leader in health care. During the 1990's, Scheur Management Group (SMG) successfully turned around failing health

plans throughout the nation. For example, Scheur's team turned around Family Health Plan in Miami, ensuring thousands of patients had healthcare coverage after that city was devastated by Hurricane Andrew.

In 1999, Southeastern Medical Alliance (SMA) in Louisiana was "in horrible financial condition," "losing millions upon millions of dollars," and was "on the verge of failure." SMA's owners sought Scheur's assistance. However, the owners were unwilling to make the substantial financial commitment necessary to turn SMA around. With approval from the Louisiana Department of Insurance (LDOI), Scheur acquired SMA through his acquisition company on January 1, 2000, planning to rehabilitate it through internal improvements and outside investment.

Scheur renamed the health plan as "The Oath For Louisiana" and began attempting to turn it around. The Scheur team succeeded in reducing losses and improving the plan. Scheur personally invested $1,668,000 in The Oath, and ultimately lost it all. Scheur recruited former New Jersey Deputy Insurance Commissioner Rodney Moyer to serve as Chief Executive Officer. Thereafter, The Oath filed with the LDOI the first of the quarterly and annual financial statements on which the indictments were based. The indictments alleged that defendants reported assets to LDOI that did not meet regulatory requirements, thus allowing the Oath to stay in business while it was insolvent. At trial, there was conflicting testimony regarding the legitimacy of the

assets at issue, as well as whether LDOI Deputy Commissioner Richard O'Shee had authorized Scheur to include those assets in the regulatory filings.

In March, 2001, LDOI personnel recognized that the previous owners of SMA had understated the plan's liabilities by $44 million, rendering it insolvent by over $33 million before Scheur's company ever acquired it. Nonetheless, LDOI permitted The Oath to acquire another failing plan that LDOI knew was insolvent by $10 million. Then, in late 2001, LDOI directed The Oath to remove a parent company receivable from its books, plunging the plan into capital insolvency. In April 2002 LDOI took over the plan and removed the Scheur team.

2. Procedural History

a. Dismissal of the First Three Indictments

In November 2005, Scheur and others were indicted for mail fraud and conspiracy. In February and August 2006, superseding and second superseding indictments were filed. The indictments alleged that defendants fraudulently misstated The Oath's financial position on statements filed with LDOI in 2000-01. In April, 2007 the district court dismissed those indictments under *Cleveland v. United States*, 531 U.S. 12 (2000), because they failed to allege that anyone other than the LDOI was defrauded. On April 27, 2007, a third superseding indictment was issued. The district court denied defense motions to dismiss.

b. Pretrial Proceedings Regarding Scheur's Blindness

The district court held a hearing regarding trial issues that may arise due to Scheur's disability. The government asked the court to question Scheur and appoint him a reader/interpreter. Scheur sought a competency hearing, arguing that his blindness rendered him unable to assist in his defense in a document intensive financial crime case. The court held a hearing and questioned Scheur *in camera*.

The district court denied Scheur's request for Braille translations of government exhibits and did not appoint a reader/interpreter. The court stated that "at a bare minimum, pursuant to this Court's scheduling order, Scheur has had access to the specific documents the government intends to introduce at trial since April 4, 2008." The court ordered two "special accommodations." Scheur could (1) use his Braille computer during trial, and (2) use Braille translations of exhibits if he testified. Of course, all of the participants were allowed to use computers at trial. Moreover, Scheur did not testify. Thus, he received no "special" accommodations at all.

c. The Government's Late Disclosure of Evidence in Hard Copy

Six days before trial, the Government added 68 exhibits and, *for the first time*, disclosed to Scheur's counsel *2,837 pages* of grand jury testimony and witness statements. This material was provided *in*

hard copy – unreadable by Scheur. Scheur moved for a continuance to allow him time to have this material converted into a form he could read and review with his attorneys. Scheur noted that the statement in the Court's April 17 Order – that "at a bare minimum" Scheur had received all exhibits by April 4 – was no longer true. The court denied the continuance. It was physically impossible for Scheur to review (or have read to him) this nearly 3,000 pages of newly produced material in the six days between its production and the trial. Then, three days before trial, co-defendant Rodney Moyer pled guilty and became a Government witness. On May 3 and 4, 2008, *twenty-four hours before Moyer testified*, the Government disclosed another *539 pages of hard copy statements and exhibits* relating to him.

d. Trial, Including the Prosecutor's Closing Argument

A jury trial was held in April and May, 2008. There was conflicting testimony regarding the propriety of the transactions at issue. Witnesses testified in defendants' favor on the legitimacy of assets claimed in Oath financial statements, Louisiana's statutory accounting rules, and the discretion of the LDOI to permit reporting of assets at variance with National Association of Insurance Commissioners' guidelines.

In rebuttal closing, the Assistant U.S. Attorney stated that "*this case was about lying on the financial reports to stay in business and that's where we're*

going to start." He then turned toward the three defendants, raised his voice, gestured at them, and stated "*Not one of these defendants is stepping up and saying that they did anything wrong.*" Defendants moved for mistrial. The court denied the motions. The court attempted a curative instruction. After the instruction the prosecutor stated: "*What I meant to say was here is that there is blame being pla[c]ed at the face of everybody in this courtroom but there's no responsibility at all being taken on behalf of the defendants.*"

e. The Jury Deliberations, Notes and Split Verdict

The jury deliberated for well over two full days and wrote multiple notes to the district judge indicating that they were having difficulty reaching consensus. The jury ultimately found Scheur guilty on eight counts and not guilty on six counts. The verdict was accompanied by a typewritten note stating that "we do hope (and some of us pray) that we have not done wrong by the defendants, the people of the United States, or this court." The court questioned each juror *in camera* regarding the note's creation. Jurors' *in camera* comments further indicated that they had difficulty reaching a verdict.

f. Sentencing

The district court rejected the government's argument that defendants caused losses of approximately $20 million, stating that The Oath was not a "sham" healthcare plan and that it "continued to pay claims that might have gone unpaid if not for the defendants' efforts." The court held that "the amount of the loss cannot reasonably be determined due to the rapidly failing condition of the healthcare plan before Mr. Scheur even took it over." The court calculated the guidelines at 97-121 months, but varied, sentencing Scheur to 20 months imprisonment. The court stated its reasons, referencing testimonials from approximately 100 letter writers:

> The letters attest to Mr. Scheur's selflessness, his desire to improve the lives of those around him, and his dedication to succeeding and inspiring others despite his own personal hardships. Letters are written by people from all walks of life. Clearly, Mr. Scheur's selfless acts began long before these proceedings and were given without consideration as to how they might affect the court's determination.

g. Release on Bond Pending Appeal

The district court granted Scheur bond pending appeal. The court held that the defense had raised three substantial questions of law or fact that would likely result in a new trial or judgment of acquittal if resolved in defendants' favor on appeal. The court

recognized that this was a close case in which the prosecutor's comment on defendants' silence may have been prejudicial.

> In a case such as this, where the jurors deliberated for several days, sent a number of written notes to the court seeking clarification and expressing difficulty in reaching agreement, and then ultimately rendered a split verdict, the prosecutor's remarks present an additional substantial issue [on appeal].

h. The Fifth Circuit Decision

The Fifth Circuit affirmed Scheur's conviction. App. 1-48. It held that even assuming the prosecutor's comments were improper, any error was harmless. App. 29-32. The circuit court supported this conclusion by noting that the jury rendered a split verdict, and thus could not have been "inflamed" by the prosecutor's remarks. App. 31. This was the exact opposite of the district court's statement in its bond order – that the split verdict reflected the closeness of the case. Moreover, Scheur never argued that the comment "inflamed" the jury; rather, he argued that the comment may have caused an impermissible inference to influence conviction on some counts.

With regard to the late disclosure of approximately 3,000 pages of new materials, the Fifth Circuit incorrectly stated that Scheur did not contend the disclosure was "impermissibly late." App. 36. That is precisely what Scheur argued in the district and

circuit courts. The Fifth Circuit also noted that in oral argument the government contended that the disclosure was "in accord with the local rules." App. 31. However, there is no local rule on Jencks Act disclosure in the Eastern District of Louisiana.[1] The Fifth Circuit apparently did not check those rules to see if the government attorney's statement was accurate.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT OPINION UNDERMINES THE RIGHTS OF THE DISABLED BY HOLDING THAT A BLIND DEFENDANT MAY BE DENIED A REASONABLE OPPORTUNITY TO PREPARE AND PRESENT A DEFENSE IN A COMPLEX, DOCUMENT INTENSIVE FRAUD TRIAL

Barry Scheur has been totally blind since birth. Yet he stands convicted following a trial at which the parties marked 566 exhibits for identification and entered 152 of them (totaling over 900 pages) into evidence. Scheur sat blindly while witnesses were examined on these exhibits and jurors viewed them

[1] The Eastern District of Louisiana has eight Local Criminal Rules: 5 (Initial Appearance), 12 (Pretrial Motions), 23 (Trial by Jury or Judge), 32 (Sentence and Judgment), 46 (Release from Custody), 49 (Service and Filing of Papers), 53 (Courtroom Conduct), and 58 (Misdemeanor and Petty Offense Procedures). None of them address discovery.

on a large screen. *Ferrell v. Estelle*, 568 F.2d 1128, 1132 (5th Cir. 1978) ("A defendant's inability to spontaneously understand testimony being given would undoubtedly limit his attorney's effectiveness, especially on cross-examination") (quoting *Arizona v. Natividad*, 111 Ariz. 191 (1974) (en banc)), *opinion withdrawn due to defendant's death prior to retrial*, 573 F.2d 867 (5th Cir. 1978).

In the past forty years, this nation has recognized the fundamental right of the disabled to participate fully and equally in all aspects of American life. *See, e.g., American Council of the Blind v. Paulson*, 525 F.3d 1256 (D.C. Cir. 2008); *Alexander v. Choate*, 469 U.S. 287 (1983). Yet, under the Fifth Circuit decision, a disabled person facing the loss of his liberty can be denied the right to have even a reasonable opportunity to access the evidence against him and review it with his attorneys.

Law regarding the due process rights of disabled criminal defendants is astonishingly sparse. As stated in a leading case involving a deaf defendant, "[w]hile the [trial] court viewed the defendant as incompetent to stand trial, a more accurate view is that the judicial system was incompetent to constitutionally try the handicapped defendant." *People v. Rivera*, 480 N.Y.S. 2d 426, 433 n.11 (N.Y. Sup. 1984). This court should address and delineate clearly the rights of a disabled person in a criminal trial.

The District Court held that Scheur's constitutional rights were "reasonably" protected by two illusory "accommodations": (1) Scheur was allowed to

use his Braille computer; however, every party and lawyer in the courtroom was allowed to use a computer; and (2) Scheur would have been allowed to use Braille translations of exhibits if he had testified; however, he did not testify. In sum, the District Court effectively granted Scheur *no accommodations* at all.

Worst of all, the Court denied Scheur's motion for the simple accommodation of *a postponement of the trial date* when the government dumped 2,837 pages of critical witness statements and grand jury testimony – *all in paper* – on his counsel six days before trial. Contrary to the circuit court's statement (App. 36), *none* of this material had been available to Scheur previously. If Scheur had done nothing but sit while someone read these statements and testimony to him 12 hours each day until trial, he would have had to listen to, comprehend, and assist his counsel in responding to 40 pages per hour.

The failure to provide Scheur reasonable accommodations denied him a host of constitutional rights – including those to be present, to assist his counsel in his own defense, and to confront and cross-examine witnesses against him. Therefore his trial violated due process. *State v. Schaim,* 600 N.E.2d 661 (Ohio 1992) ("a severely hearing-impaired defendant cannot be tried without adopting reasonable measures to accommodate his or her disability") (citations omitted).

Scheur has found no case in which a blind defendant has ever been prosecuted in a document-intensive case. There have been prosecutions of blind

defendants for crimes including rape, stolen property, dealing drugs and sale of whiskey.[2] However, such trials are fundamentally different from a fraud prosecution in which more than 150 exhibits totaling over 900 pages were entered into evidence, displayed on a large screen to the jury, and referred to and explained by witnesses – all while Scheur sat in the dark as sighted people argued and decided his fate.

The district court addressed the issues of "reasonable accommodations" and competency to stand trial, placing principal reliance on an Illinois state case. *People ex rel. Myers v. Briggs*, 263 N.E.2d 109 (Ill. 1970). A leading case regarding the right to translation is *United States ex rel. Negron v. New York,* 434 F.2d 386 (2d Cir. 1970), which recognized a constitutional basis for the right to translation. The Second Circuit found that a trial without an interpreter denied the defendant a series of rights, including the right to be present, to participate effectively in his own defense, to consult with his attorney, and to cross-examine witnesses. *Id.*

Thirty-two years ago, the Fifth Circuit addressed the issue of a deaf defendant's right to translation in

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[2] The district court cited six prosecutions of blind defendants, including a 1916 Georgia sale of whiskey case and a 1925 Texas stolen property case. The court also cited the terrorism prosecution, *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999). Defendant Rahman did not raise a due process challenge. Scheur's defense is informed and believes that Rahman was partially sighted.

Ferrell v. Estelle, 568 F.2d at 1128 (5th Cir. 1978). That court recognized that accommodations for a disabled defendant are essential to securing rights, including those "to confront witnesses against him and his right to assist in his own defense." *Id.* at 1131. Of critical significance, the court held that ensuring the defendant's right to assist in his own defense "is primarily the task of the trial judge." *Id.* at 1132.

While a totally blind defendant may be better able than a deaf one to comprehend a trial based principally *on oral testimony*, such was not the case here. This case alleged filing of false written documents. The Fifth Circuit emphasized Scheur's academic and professional accomplishments (App. 35), but ignored the undisputed evidence that he is unable to read the financial statements which formed the basis of the Government's case against him.

Throughout trial the prosecution flashed the documents on a large screen and displayed them to the jury as witnesses commented on them. For example, the prosecution used Alan Parker, the first witness, to introduce and publish to the jury 14 exhibits. These included two quarterly financial statements, emails between the witness and others, and general ledgers and journal entries. Scheur could not see or read these documents as they were displayed and explained. *Ferrell v. Estelle*, 568 F.2d at 1132 ("A defendant's inability to spontaneously understand testimony being given would undoubtedly

limit his attorney's effectiveness, especially on cross-examination."). This pattern continued with virtually every Government trial witness.

Scheur's counsel moved for a mistrial immediately following Parker's testimony stating "Mr. Scheur cannot adequately follow, comment upon, and assist us in analyzing the evidence, particularly since there were numerous documents being sent back and forth." The motion was denied. To assist counsel, the defendant must be able to competently follow, analyze and comment upon the proceedings in court, from beginning to end. *United States v. Helmsley*, 733 F. Supp. 600, 605 (S.D.N.Y. 1989). Scheur could not do so without either (1) being granted a continuance following the government's late discovery dump or (2) being provided with Braille exhibits. He received neither accommodation.

Virtually every witness was asked to review and explain to the jury written documents, including financial statements, accounting and bank records, and other types of materials. While a deaf defendant would at least be able to *see* these exhibits, Scheur was reduced to sitting at counsel table. Yes, Scheur is an attorney and Yale Law School graduate. However, he is not a magician. He cannot analyze – or assist his counsel in understanding – material that he has never had an opportunity to see. The District Court's failure to provide him reasonable accommodations denied him both "the right to confront witnesses against him and his right to assist in his own defense." *Ferrell*, 568 F.2d at 1131. One of the elements

of competency is the ability to assist counsel, the very premise on which the constitutional guarantee of "effective assistance" rests. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

The illusory "accommodations" provided to Scheur were meaningless. *Everyone* in the courtroom was allowed to use a computer. Allowing Scheur to use one was no accommodation at all. Allowing Scheur to use Braille exhibits *if he testified* was also useless, since Scheur did not testify. Moreover, the accommodations Scheur sought were more than reasonable – a postponement of the trial and/or Braille exhibits. Both requests were denied.

It was physically impossible for Scheur to comprehend, let alone assist his counsel in responding to, these voluminous materials in the 160 hours before trial. Thus, Scheur was – quite literally – left in the dark with regard to them. There were simply not enough hours in the day to have the hard-copy materials translated into Braille or read to him in one week. A continuance would have been a reasonable accommodation. The Court's denial of one was a denial of due process.

The Fifth Circuit excused the district court's failure by misstating the record. The opinion states that although the 3,000 pages of material were provided just before trial, "any defendant, with or without a physical impairment, could have had difficulty reviewing the voluminous new exhibits, but Scheur does not contend that the Government

produced the material impermissibly late." App. 36. With due respect to the Fifth Circuit, that sentence combines a non-sequiter with an inaccuracy. The fact that a sighted person would have been prejudiced by the late disclosure does not mean that a blind person was not prejudiced by it. Moreover, Scheur did argue – in the trial court *and* the Fifth Circuit – that the material was produced late.

The circuit court then extended from absurdity to fiction. The opinion relies on the government's statement at oral argument that it produced the material "in accord with the local rules." App. 36. However, ***there is no local rule*** on the topic. Put bluntly, the Fifth Circuit decision rests upon a non-sequiter, followed by an inaccuracy, topped by a citation to a local rule that does not exist.[3]

The denial of reasonable accommodations for Scheur constituted a denial of due process. Courts must make reasonable accommodations for a criminal defendant who is deaf, does not speak English, or has a similar disability that inhibits his ability to comprehend the evidence and proceedings against him. *State v. Schaim,* 600 N.E.2d 661 (Ohio 1992) ("A defendant who cannot hear is analogous to a defendant who cannot understand English, and a severely hearing-impaired defendant cannot be tried without adopting reasonable measures to accommodate his or her disability") (citations omitted); *Rivera,* 480

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[3] *See supra* Note 1.

N.Y.S.2d at 432 (failure to provide deaf defendant with sign-language interpreter violated due process); *People v. Freeman,* 882 P.2d 249 (Cal. 1994) (discussing due process rights of a deaf defendant); *People v. Fleagle,* 472 N.E.2d 155 (Ill. App. 1 Dist. 1984) (same); *United States v. Cirrincione,* 780 F.2d 620, 634 (7th Cir. 1985); *Negron*, 434 F.2d at 386 (2d Cir. 1970).

This case creates an absurd result – disabled people are entitled to equality in all areas of American life, except when one of them is a defendant in a criminal trial. This dangerous precedent should be reviewed on certiorari and reversed. Just as due process demands reasonable accommodations for a deaf defendant or non-English speaker, so must the court make reasonable accommodations for a blind defendant. Scheur was put on trial for complex financial crimes without a fair chance to see, comprehend, or assist in his defense regarding the thousands of pages of written documents, witness statements and other materials the Government relied upon to convict him. This was a violation of his fundamental right to due process of law. *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Pate v. Robinson*, 383 U.S. 375, 378 (1966).

II. THE FIFTH CIRCUIT OPINION ILLUSTRATES THE INCONSISTENT APPLICATION OF THIS COURT'S DECISION IN *GRIFFIN V. CALIFORNIA* AND THE LACK OF STANDARDS FOR APPLICATION OF THE HARMLESS ERROR RULE

A. Prosecutorial Comment On A Defendant's Decision Not To Testify

In rebuttal closing, the prosecutor gestured emphatically toward defendants, raised his voice and stated: "*Not one of these defendants is stepping up and saying that they did anything wrong.*" The district court denied defendants' mistrial motions and immediately gave burden of proof and presumption of innocence instructions. The court did *not* immediately give a curative Fifth Amendment instruction – that no adverse inference may be drawn from a defendant's decision not to testify. After the instruction, the prosecutor continued: "What I meant to say was here is that there is blame being pla[c]ed at the face of everybody in this courtroom but *there's no responsibility at all being taken on behalf of the defendants*."

This Court long ago held that a prosecutor's "comment on the refusal to testify is a remnant of 'the inquisitorial system of criminal justice,' which the Fifth Amendment outlaws." *Griffin v. California*, 380 U.S. 609, 614 (1965) (internal citation omitted). "Prosecutors are prohibited from commenting directly or indirectly on a defendant's failure to testify in a criminal case." *United States v. Johnston*, 127 F.3d 380, 396 (5th Cir. 1997). However, the implementation

of *Griffin* by the lower courts has led to a body of case law in which the line between what constitutes an impermissible comment and what does not is unintelligible. *Compare United States v. Roberts*, 119 F.3d 1006 (1st Cir. 1997) (reversal under plain error standard due to prosecutorial comment on defendant's silence at trial); *United States v. Tenorio*, 69 F.3d 1103 (11th Cir. 1995) (reversal due to prosecutor's comment on post-arrest silence); *United States v. Kallin*, 50 F.3d 689 (9th Cir. 1995) (same); *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993); *Ben-Yisrael v. Davis*, 431 F.3d 1043, 1050 (7th Cir. 2005); *with United States v. Rutkowski*, 814 F.2d 594, 597 (11th Cir. 1987) ("there is no explanation for anybody being on that plane" held not improper); *United States v. Watkins*, 811 F.2d 1048, 1412 (11th Cir. 1987) ("why then could not the defendant say 'well, that's not me on the tape'" held not improper).

Here, the prosecutor chastised "these defendants" for failing to "step up" and "take responsibility" for the alleged crime, yet the Fifth Circuit did not find it reversible error. Conversely, in *United States v. Bates*, 512 F.2d 56 (5th Cir. 1975), the Fifth Circuit reversed under plain error review based on a prosecutor's statement that "[y]ou didn't hear from the culprit." *Id.* at 58. The prosecutor's comments in this case were equally clear, and reversal was called for. As in *Johnston*, the prosecutor made the error worse by his raised voice and gesturing toward the defendants. *See Johnston*, 127 F.3d at 397 (prosecutor made "sweeping

arm gesture indicating the individuals seated at counsel tables").

B. The Harmless Error Rule: Contradictory Interpretations Of The Meaning Of A Split Verdict

The "harmless error" rule has become a method for troublesome cases to be disposed of without addressing the merits of a defendant's argument. As stated long ago by Judge Goldberg: "The *Chapman* harmless error rule was not intended to be a cover-up for every prosecutorial error . . . We must be careful lest the purgatory of the harmless error doctrine erode our sacred constitutional rights." *United States v. Hammond*, 598 F.2d 1008 (5th Cir. 1979) (citing *Chapman v. California*, 386 U.S. 18 (1967)). The rationales that courts can use to declare an error harmless are virtually limitless.

Here, the Fifth Circuit took the very facts that the district court held illustrated the case was *close* – lengthy deliberations, jury notes expressing difficulty reaching consensus, and split verdict – and held that they illustrated *the opposite* – i.e., that the split verdict illustrates the prosecutor's comment was harmless. App. 31. This was easy enough to do, since there is virtually no limit to the rationales on which an error can be declared harmless, even where case law is directly contrary. *United States v. Kallin*, 50 F.3d 689, 695 (9th Cir. 1995) ("[t]he partial acquittal indicates that the government's case was not

definitive and that the jury's consideration of the impermissible inference may have been a factor resulting in conviction on some counts."). An error is harmless only because the court of appeals says it is.

The district court found that the split verdict indicated the closeness of the case, thus heightening the chance that the prosecutor's comments prejudiced defendants:

> Under Fifth Circuit precedent, it is well settled that "a prosecutor may not comment directly or indirectly on a defendant's failure to testify." In a case such as this, where the jurors deliberated for several days, sent a number of written notes to the court seeking clarification and expressing difficulty in reaching agreement, and then ultimately rendered a split verdict, the prosecutor's remarks present an additional substantial issue [on appeal].

The trial court heard the evidence and interpreted the split verdict as an indication of a close case in which the risk of prejudice from the prosecutor's remarks was heightened. The Fifth Circuit used it as a way to find harmless error. This contradicts jurisprudence in that and other courts. *See United States v. Garza*, 608 F.2d 659, 665-66 n.6 (5th Cir. 1979); *Dugas v. Coplan*, 428 F.3d 317 (1st Cir. 2005); *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993); *United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990); *United States v. Harding*, 525 F.2d 84, 87 n.7 (7th Cir. 1975); *United States v. Caro-Quintero*,

769 F. Supp. 1564 (C.D. Cal. 1991); *United States v. Burse,* 531 F.2d 1151, 1155 (2d Cir. 1976) ("in an admittedly close case such as this, prosecutorial misstatements take on greater importance"); *United States v. Van Eyl,* 468 F.3d 428, 438 (7th Cir. 2006).

The Fifth Circuit further buttressed its "harmless error" finding by stating that "the district court gave an immediate curative instruction that the Government bore the burden of proof and that the defendants need not testify or prove anything." The Court cited *United States v. Lampton*, 158 F.3d 251, 260 (5th Cir. 1998) for the assertion that "such an instruction cures any alleged harm from the prosecutor's improper remarks." However, *Lampton* does not include the text of the instruction given there, nor does it state whether the defendant objected – in the trial court or on appeal – to the Court's failure to instruct that *no adverse inference may be drawn from defendant's decision not to testify. Id.* Here, defendants expressly objected that the curative instruction was insufficient for that reason, citing *United States v. Griffith*, 118 F.3d 318 (5th Cir. 1997).

In *Griffith* – as here – the "curative" instruction addressed the burden of proof and the presumption of innocence, but it *did not say that no adverse inference could be drawn from the defendant's silence.* The "curative" instructions here and in *Griffith* are substantively identical. *See Griffith*, 118 F.3d at 324. Yet in *Griffith* the Fifth Circuit conducted plain error review, and stated that "We conclude without difficulty that the district court erred by failing to

instruct on the Fifth Amendment privilege." *Id.* The Court noted:

> [T]he district court failed in its obligation to correct the error . . . the district court reminded the jury that Griffith was presumed innocent and that the government had the burden of proving him guilty beyond a reasonable doubt. ***The court neglected to tell the jury that Griffith had a constitutional right not to testify, and that his exercise of that right could not be held against him.***

118 F.3d at 325 (emphasis added).

This Court then held that "the error was plain" and stated:

> The proper remedy should have been as obvious as the initial constitutional error; ***a Fifth Amendment violation calls for a Fifth Amendment instruction. Instructions on the burden of proof and presumption of innocence "are no substitute for [an] explicit instruction on the Fifth amendment privilege.***

118 F.3d at 325 (emphasis added).

The Fifth Circuit ignored precedent and found the error harmless on the basis of a curative instruction that constitutes plain error under that court's own jurisprudence. *Compare* App. 31 *with Griffith*, 118 F.3d at 324-26. The trial court heard the evidence and expressly found that the split verdict

illustrated ***the closeness of the case***, thus ***heightening*** the chance that the prosecutor's comments prejudiced defendants. The trial court's conclusion is consistent with precedents in the Fifth Circuit and other courts. *United States v. Garza,* 608 F.2d 659, 665-66 n.6 (5th Cir. 1979) ("The jury apparently found the case quite close despite the prosecutor's improper attempts to influence it. It took eleven hours for the jury to reach a verdict."); *Kallin,* 50 F.3d at 695 ("[t]he partial acquittal indicates that the government's case was not definitive and that the jury's consideration of the impermissible inference may have been a factor resulting in conviction on some counts."); *United States v. Burse,* 531 F.2d 1151, 1155 (2d Cir. 1976) ("in an admittedly close case such as this, prosecutorial misstatements take on greater importance").

The lack of standards for declaring an error harmless allowed the Fifth Circuit to turn the trial court's finding on its head. The circuit court held that the split verdict showed not *the closeness of the case*, but rather that the jury "was not inflamed by the prosecutor's comments" and thus "the prosecutor's comments failed to rise above the level of harmless error." By this logic, the defense would have been better off if Scheur had been convicted on all counts. Of course, if that had occurred, the court could simply have said that the unanimous verdict illustrated the overwhelming evidence of guilt – thus rendering the error harmless. *Johnston*, 127 F.3d at 380 (5th Cir. 1997) (error is harmless as to defendants against whom evidence was overwhelming). Heads, the

government wins. Tails, the defendant loses. This will always be the case absent a clear limitation of the harmless error rule.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-31148

UNITED STATES OF AMERICA

Plaintiff-Appellee-Cross-Appellant

v.

ROBERT MCMILLAN; BARRY S SCHEUR

Defendants-Appellants-Cross-Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana

(Filed Mar. 11, 2010)

Before REAVLEY, DAVIS, and STEWART, Circuit Judges.

REAVLEY, Circuit Judge:

Barry Scheur and Robert McMillan appeal their convictions for conspiracy and substantive mail and wire fraud offenses in connection with the failure of a health maintenance organization (HMO) known as The Oath for Louisiana, Inc. They challenge the timeliness and sufficiency of the superseding indictment, and they raise several claims of trial error. The Government cross-appeals the reasonableness of the sentences imposed. We conclude that

the superseding indictment did not broaden the charges against the defendants and was both timely and sufficient. We reject the defendants' remaining claims and conclude that the district court did not abuse its discretion at sentencing. We therefore AFFIRM the district court's judgments in all respects.

I.

This case concerns a scheme by defendants Barry Scheur and Robert McMillan to fraudulently represent the financial condition of The Oath for Louisiana, Inc., a Louisiana-licensed HMO. The Oath, as an HMO or plan, collected premiums and insured the medical expenses of its subscribers. The Government charged that the defendants devised a scheme to defraud and obtain money or property by filing false financial reports with the Louisiana Department of Insurance indicating that the HMO met minimum statutory net worth requirements in order to ensure the continued operation of the plan and the collection of premiums and management fees at a time when The Oath did not satisfy state requirements.

Scheur, a successful health care consultant from Massachusetts, acquired the HMO in January 2000 from a group of hospitals that had been running the plan as Southeastern Medical Alliance. Prior to the acquisition, Southeastern Medical Alliance had been losing money, and Scheur had been acting as its consultant to help improve its financial difficulties.

Scheur agreed to take over ownership as part of an effort to turn around the HMO, and the prior owners made a capital contribution to the company of approximately $14 million as part of the transfer. After renaming the company, Scheur became its Owner, President, and Chief Executive Officer. A separate consulting firm controlled by Scheur, known as the Scheur Management Group, provided management services to The Oath and received fees of $200,000 to $350,000 per month. Scheur Management Group hired McMillan to help manage The Oath. He held various positions in the company, including Vice President, Chief Operating Officer, and Chief Financial Officer. Two other businesses controlled by Scheur acted as The Oath's parent company.

Louisiana law requires all HMOs in the state to file quarterly and annual financial reports containing information about assets and liabilities, as well as accounts receivable and capital contributions. The state mandates that each plan maintain a minimum statutory net worth of $3 million as a cushion for claims. Financial reports are filed by mail and signed by company officials as true and correct. The state uses these reports, which are available to the public, to monitor the financial health of the plans operating in Louisiana and to ensure that HMOs can pay claims from medical services providers for care given to the plans' insureds. If an HMO suffers financial trouble, the Department of Insurance can take several remedial steps, such as placing the plan on

administrative supervision, which is a period of intense financial monitoring; ordering a restructuring of the plan; or placing it into receivership and liquidating all assets to pay off its liabilities.

Despite Scheur's efforts as a "turnaround" specialist, The Oath continued to suffer financially and to incur increasing losses with each passing quarter. Because of these losses The Oath became in danger of falling below the $3 million capital surplus threshold. Beginning with the third quarter of 2000, the defendants caused to be filed false financial reports showing that the plan met or exceeded the minimum statutory amount by listing speculative or nonexistent receivables as assets. They also recorded as assets receivables "due from parent," which were supposed to be capital infusions from the parent company but which the parent company in reality did not have the ability to provide and which never materialized. The "due from parent" and other speculative assets did not meet the state criteria to be reported as assets and were invalid. These purported assets were included in quarterly financial statements for the third quarter of 2000 and the first and second quarters of 2001. Without these invalid assets reported on its financial statements, The Oath would not have met the minimum statutory net worth requirements.

As part of the scheme, Scheur also obtained a personal loan from a bank in New Orleans for $1.2 million in February 2001. This money was wire transferred to the account of The Oath's parent

company in Massachusetts before being transferred back to New Orleans and deposited into The Oath's account. The defendants reported the transaction in The Oath's 2000 annual financial report to the state insurance department as a capital infusion from the parent in order to raise The Oath's net worth above the $3 million threshold. In reality, there was never a real capital infusion because the defendants expected The Oath to pay Scheur back, which it did in April 2001.

Had the transfer of funds to The Oath been reported correctly there would have been no effect on The Oath's net worth because there would have been an increase in cash assets along with a corresponding increase in liabilities. Instead, it was reported as a straight cash infusion of equity. Then when Scheur's personal loan became due, the defendants withdrew the money from The Oath's account in New Orleans, wired it to a Scheur Management Group account in Massachusetts, and then transferred it back to the original lending bank in New Orleans, allowing Scheur to recoup his money and pay off the loan. They recorded the flow of money to Scheur Management Group on The Oath's internal books as a pre-payment of the management fees for April, May, and June of 2001 even though The Oath continued to pay its monthly management fees, thus double-paying the management company. To cover up this fact, in May 2001 the defendants reclassified the transaction from a pre-payment of fees to an account receivable in the form of a loan from The Oath to the

parent company. To support the transaction they later created loan documents and corporate resolutions in September 2001, which were backdated to the original transaction date of April 2001.

Through such financial machinations, the defendants were able to keep The Oath operating free from regulatory interference and to continue collecting management fees from The Oath and insurance premiums from insureds even though the plan was not meeting the state requirements for net worth. The state Department of Insurance became concerned about The Oath's financial condition, and it instructed the company to remove from its balance sheet suspicious payables from the parent company that were listed as assets.

In September 2001 the insurance department placed The Oath on administrative supervision. It also ordered that the monthly management fee paid to Scheur Management Group be reduced. In April 2002, however, with losses continuing to mount, the Department placed The Oath into receivership and began liquidation proceedings. At that time, The Oath's liabilities exceeded its assets by more than $40 million, much of which was owed to medical services providers. By that time, Scheur Management Group had been paid fees from The Oath of approximately $6.1 million.

The Government began the instant prosecution in November 2005 with an indictment charging the defendants with conspiracy and mail fraud, in

violation of 18 U.S.C. §§ 371 and 1341. It later filed superseding indictments in 2006 that added additional counts of mail fraud and charges for wire fraud, in violation of 18 U.S.C. § 1343.

The defendants moved to dismiss the indictment on the ground that the only victim alleged therein was the state Department of Insurance, and the only "property" that could have been fraudulently obtained was a license to do business in Louisiana, which was not a cognizable mail fraud offense under the Supreme Court's decision in *Cleveland v. United States*.[1] After initially denying the motion, the district court reconsidered and granted it. The court held that the indictment had not set forth allegations that specific victims were defrauded of specific property.

On April 27, 2007, less than six months after the dismissal, the Government obtained a new indictment against the defendants, charging one count of conspiracy to commit mail and wire fraud, five counts of substantive mail fraud, and eight counts of substantive wire fraud. The new indictment was substantially similar to the dismissed indictment but specified that the defendants had devised a scheme to defraud and obtain money and property "from The Oath, The Oath's insureds, and The Oath's medical services providers." It also specified that the defendants sought to enrich themselves through the continued operation of The Oath "by continuing to

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[1] 531 U.S. 12, 121 S. Ct. 365 (2000).

collect premiums from the insureds and continuing to collect management fees from The Oath."

The defendants again moved to dismiss the indictment, arguing that it was barred by the five year statute of limitations for federal criminal offenses. The defendants contended that the new indictment did not relate back to the original indictment because it impermissibly broadened the charges against them by adding new victims. The district court denied the motion.

Scheur was convicted at trial of conspiracy, three counts of mail fraud, and four counts of wire fraud. McMillan was convicted of conspiracy, one count of mail fraud, and one count of wire fraud.[2] The district court departed from the guidelines range for both defendants, sentencing Scheur to 20 months in prison and McMillan to 13 months. Both defendants timely appealed and have adopted the issues and arguments of each other's appellate brief.

II.

The defendants raise three issues with respect to their indictment. We consider each in turn.

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[2] A third defendant, Rodney Moyer, pleaded guilty to conspiracy prior to trial, and a fourth defendant, Danette Bruno, was acquitted by the jury. Neither is part of the instant appeal

A.

Scheur and McMillan both challenge the timeliness of the new indictment filed in 2007. "We review the district court's fact findings in relation to the statute of limitations for clear error and its legal conclusions *de novo.*" *United States v. Gunera.*[3]

An indictment charging a defendant with a federal non-capital crime generally must be returned within five years after commission of the offense.[4] Once an indictment is filed, the limitations period is tolled on the charges set forth in the indictment. *United States v. Schmick.*[5] A superseding indictment that is filed while the original indictment is pending will relate back to the original indictment, and therefore also be timely, unless it broadens or substantially amends the charges.[6] However, a *new* indictment filed after an original indictment has been dismissed and the limitations period has passed is governed by 18 U.S.C. § 3288. That statute permits the Government to refile the indictment within six months after the original indictment is found to be

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[3] 479 F.3d 373, 376 (5th Cir. 2007).

[4] 18 U.S.C. § 3282(a).

[5] 904 F.2d 936, 940 (5th Cir. 1990); *see also United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 778-79 (9th Cir. 1986) (collecting cases).

[6] *Schmick,* 904 F.2d at 940; *see also United States v. Salmonese,* 352 F.3d 608, 622 (2d Cir. 2003).

defective.[7] But as with the filing of a superseding indictment, a new indictment filed under § 3288 may not broaden or substantially enlarge the charges of the original indictment. *United States v. Italiano.*[8]

The defendants reason that the 2007 indictment was filed more than five years after the end of their allegedly fraudulent conduct, which was in April 2002 when The Oath was placed on administrative supervision. Although this new indictment was filed less than six months after the original indictment was dismissed, the defendants argue that § 3288 cannot save it because the new indictment impermissibly broadened the charges by alleging for the first time new victims of the alleged scheme. The defendants contend that whereas the original indictment charged only that the Louisiana Department of Insurance had been defrauded by the mail and wire fraud scheme, the new indictment added as

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[7] The statute provides, in relevant part:

> Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information. . . .

18 U.S.C. § 3288.

[8] 894 F.2d 1280, 1283 (11th Cir. 1990) ("In sum, an untimely indictment can only be saved by the section 3288 exception if it does not broaden or substantially amend the original charges 'tolled' by the previous indictment.").

victims The Oath, The Oath's insureds, and The Oath's medical services providers. We are not persuaded.

The central policy underlying the limitations doctrine is notice to the defendants, which we consider to be the "touchstone" when deciding if a new indictment has substantially changed the original charges.[9] "If the allegations and charges are substantially the same in the old and new indictments, the assumption is that the defendant has been placed on notice of the charges against him."[10] We are concerned with whether the defendant "knows that he will be called to account for certain activities and should prepare a defense."[11] We agree with the district court that the original indictment gave the defendants sufficient notice of the acts for which they would be accountable, and the 2007 indictment did not impermissibly broaden those charges.

The original indictment in this case charged that from September 2000 through April 2002 the defendants

> did knowingly and willfully devise and intend to devise a scheme and artifice to defraud and obtain money and property by means of material and false and fraudulent

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[9] *Schmick*, 904 F.2d at 940.

[10] *Id.*

[11] *Id.*

> pretenses, representations, and promises by misleading the LDOI [Louisiana Department of Insurance] into believing that The Oath was meeting the statutorily required minimum net worth of $3 million, and thereby unlawfully enriching themselves through the continued operation of The Oath, during a time when The Oath was not meeting that statutorily required minimum net worth.

The indictment described The Oath's business and alleged that the plan "received insurance premiums from and on behalf of member individuals and groups (known as insureds) and, in turn, paid medical providers such as hospitals and physicians for services provided to the insureds." It also explained the regulatory oversight of the state insurance department and the measures that department could take with respect to HMOs failing to meet the regulatory requirements. The indictment charged that at the time The Oath was placed on administrative supervision, The Oath had paid Scheur's management company approximately $6.1 million in management fees. It also alleged that at the time The Oath was placed into receivership, the plan's liabilities exceeded its assets by approximately $45 million. It went on to describe the various mailings of allegedly false financial reports that misstated The Oath's net worth and allowed it to keep operating without intervention from the state insurance department.

In the new indictment filed in 2007, the Government charged that the defendants

> did knowingly and willfully devise and intend to devise a scheme and artifice to defraud and obtain money and property, *specifically from The Oath, The Oath's insureds, and The Oath's medical service providers,* by means of material and false and fraudulent pretenses, representations, and promises by misleading the LDOI into believing that The Oath was meeting the statutorily required minimum net worth of $3 million, and thereby unlawfully enriching themselves through the continued operation of The Oath, *specifically by continuing to collect premiums from the insureds and continuing to collect management fees from The Oath,* during a time when The Oath was not meeting that statutorily required minimum net worth.

Aside from the emphasized language above, the 2007 indictment was virtually identical to the original indictment.

As notice is the touchstone, "the crucial inquiry is whether approximately the same facts were used as the basis of both indictments."[12] We think that is the case here, and like the district court, we find the Eleventh Circuit's decision in *Italiano* persuasive. In that case, the original indictment alleged that the

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[12] *Italiano,* 894 F.2d at 1285.

defendant's participation in a bribery scheme violated the mail fraud statute through a deprivation of honest government services.[13] After the Supreme Court repudiated that theory of mail fraud in *McNally v. United States,*[14] the defendant's conviction was reversed on the ground that the indictment had been fatally flawed.[15] The Government then obtained a new mail fraud indictment alleging the same basic facts as the first indictment but changing the object of the fraud from deprivation of honest services to deprivation of property, namely a cable television franchise.[16] The Eleventh Circuit held that the new indictment was timely under § 3288 and did not broaden the charges even though the first indictment had nowhere stated that the object of the scheme was to defraud the government of a cable television franchise.[17] The court reasoned that the facts and "sequence of actions" allegedly performed by the defendant as part of the scheme were the same in both indictments and provided the defendant with notice of the conduct for which he would have to provide a defense.[18]

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[13] *Italiano,* 894 F.2d at 1281.

[14] 483 U.S. 350, 107 S. Ct. 2875 (1987).

[15] *Italiano,* 894 F.2d at 1281-82.

[16] *Id.*

[17] *Id.* at 1285.

[18] *Id.*; *see also United States v. Gengo,* 808 F.2d 1, 3-4 (2d Cir. 1986) (holding that defendant had sufficient notice of acts for which he would be held accountable and that superseding

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The same is true in the instant case. Both the original indictment and the new indictment alleged that The Oath received premiums and management fees at a time when the plan was operating in violation of state regulatory requirements; both indictments alleged the same sequence of events by the defendants to misrepresent The Oath's financial condition despite its failure to meet those requirements; and both indictments alleged the same mailings and wire transfers in furtherance of the alleged scheme.

The original indictment alleged that the defendants devised a scheme to obtain money and property and enriched themselves by the continued operation of The Oath; that they collected insurance premiums from insureds; and that they were paid large sums in management fees.

The new indictment specifically alleged that The Oath, The Oath's insureds, and the medical services providers were the source of the defrauded money and property. But we fail to see how this materially altered the charge of the original indictment when the original indictment nowhere alleged that the *state insurance department* was the source of that money or property. The new indictment merely specified that

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indictment did not broaden charges where first indictment alleged a conspiracy to evade federal income taxes and the later addition of a conspiratorial act to defraud the IRS related only to that evasion scheme).

the company, the insureds, and the medical providers lost money or property and that the defendants enriched themselves by continuing to collect premiums and management fees. This specificity fleshed out the mechanism by which the defendants carried out the scheme.[19] The new indictment neither added statutory charges against the defendants nor exposed them to increased punishment.[20] It also did not change the facts as to the defendants' underlying conduct that constituted the alleged violations of the statutes.[21] As the district court held, the new indictment provided more explicit detail to the allegation that the defendants presented false information to the state insurance department in order to collect premiums, which they used to pay themselves management fees rather than paying medical services providers for services rendered at a time when The Oath was incurring increasing losses on a

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[19] *See United States v. O'Bryant*, 998 F.2d 21, 25 (1st Cir. 1993) ("When a superseding indictment does no more than specify the exact mechanics of a defendant's participation in a previously charged offense, it does not represent a material broadening or substantial amendment of the original indictment.").

[20] *See Schmick*, 904 F.2d at 941.

[21] *See Italiano*, 894 F.2d at 1285 (stating that "the first indictment provided sufficient notice of the actions which allegedly constituted criminal conduct and of the type of evidence that the government would introduce at trial"); *id.* at 1285 n.7 (rejecting as insignificant the fact that the second indictment identified the recipient of the cable television franchise and also identified an unindicted co-schemer).

quarterly basis. We think this allegation was also inescapable from the original indictment.[22] Because we conclude that the defendants were placed on notice by the original indictment of the actions for which they would be held to account and which were then charged in the new indictment, there was no broadening of the charges and the district court correctly denied the motion to dismiss the new indictment as untimely.

B.

Defendants also challenge the sufficiency of the indictment to state a valid mail and wire fraud offense. We review the sufficiency of an indictment *de novo*. *United States v. Crow*.[23]

The mail fraud statute prohibits the use of the mail for "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises[.]"[24]

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[22] *See Salmonese*, 352 F.3d at 623 (holding that there was no broadening of charges where defendant was informed by the original indictment " 'in no uncertain terms that he would have to account for essentially the same conduct with which he was ultimately charged' " in the new indictment) (citation omitted).

[23] 164 F.3d 229, 234 (5th Cir. 1999).

[24] 18 U.S.C. § 1341. The wire fraud statute prohibits similar schemes perpetrated "by means of wire, radio, or television communication in interstate or foreign commerce[.]" 18 U.S.C. § 1343. The same analysis applies to convictions for both mail and wire fraud offenses. *See United States v. Humphrey*, 104 F.3d 65, 70 n.3 (5th Cir. 1997).

"To sufficiently charge the offense of mail fraud, the indictment must allege that (1) the defendant devised or intended to devise a scheme to defraud, (2) the mails were used for the purpose of executing, or attempting to execute, the scheme, and (3) the falsehoods employed in the scheme were material." *United States v. Ratcliff*.[25] The first element may be met by a variety of schemes,[26] but the relevant form of the scheme in this case is the deprivation of money or property.

Defendants contend that the indictment failed to state a mail fraud offense because although it alleged that The Oath, the insureds, and the medical services providers were victims of the scheme, it alleged misrepresentations made only to the state Department of Insurance, which was not deprived of any money or property. They contend that the alleged scheme to deceive the insurance department in order to obtain money from the third-party victims is contrary to Supreme Court and Fifth Circuit precedent, which they contend requires that the scheme be to defraud the actual victim and that the object of the scheme be money or property in the hands of that deceived victim. Defendants rely for

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[25] 488 F.3d 639, 643-44 (5th Cir. 2007) (footnotes omitted) (citing *United States v. Caldwell*, 302 F.3d 399, 409 (5th Cir. 2002)).

[26] For example, 18 U.S.C. § 1346 permits a defendant's scheme to include the deprivation "of the intangible right of honest services."

support of their argument on the Supreme Court's decision in *Cleveland* and our decision in *Ratcliff*.

In *Cleveland*, the Supreme Court held insufficient under the mail fraud statute an allegation that defendants made misrepresentations to state authorities when applying for a license to operate video poker machines because permits or licenses are not "property" under the mail fraud statute.[27] The Court concluded that it is not enough that the object of the fraud (the license) might become property in the recipient's hands; rather, "for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim."[28]

In *Ratcliff*, a Louisiana parish president was charged with an election scheme to defraud the parish out of salary and other benefits by concealing campaign finance violations from the state Board of Ethics, thereby deceiving the voting public about contributions, securing his reelection to office, and causing the parish to pay his salary.[29] We held that the indictment failed to state a valid mail fraud offense because there were no allegations that the parish was deceived into taking action or deprived of money it would not otherwise have afforded to the winner of the election.[30] We noted that the alleged scheme was

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[27] *Cleveland*, 531 U.S. at 15, 121 S. Ct. at 368.

[28] *Id.*

[29] *Ratcliff*, 488 F.3d at 645.

[30] *Id.*

to defraud the state Board of Ethics and the voters rather than the victim alleged in the indictment, which was the parish. We concluded that the "indictment provides no basis to find a scheme to defraud Livingston Parish through misrepresentations made to the Board of Ethics."[31]

The defendants argue that their indictment is invalid because misrepresentations made to the state Department of Insurance, like the misrepresentations made to the Board of Ethics in *Ratcliff,* did not implicate any property rights in the hands of the alleged victims of the scheme-The Oath, the insureds, and the medical services providers. We disagree. Although the defendants are correct that the object of a mail fraud scheme must be money or property in the hands of the victims, we think they read too much into *Cleveland* and *Ratcliff.*

In *Cleveland,* the Supreme Court was concerned with whether an intangible property right represented by a license for video poker could be the object of a mail fraud offense, and it held that it could not because the property at issue in an alleged scheme must actually be money or property at the time of the offense rather than a mere regulatory interest.[32] We

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[31] *Id.*

[32] *See Cleveland,* 531 U.S. at 20, 121 S. Ct. at 371 ("The question presented is whether, for purposes of the federal mail fraud statute, a government regulator parts with 'property' when it issues a license. For the reasons we now set out, we hold that § 1341 does not reach fraud in obtaining a state or

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have no similar intangible property right at issue here.

In *Ratcliff*, we were concerned with whether salary and benefits that would have been paid regardless of the defendant's misrepresentations could still be money or property under the mail fraud statute, and we held that it could not.[33] The defendants focus on *Ratcliff*'s discussion that the parish in that case was not deceived. But as we explicitly recognized in *Ratcliff*, "the misrepresentations in a mail fraud scheme need not be made directly to the scheme's victim."[34] The import of *Ratcliff* was that the alleged victim was not defrauded of any money or property.[35] Although *Ratcliff* found that the parish was not deceived, it did so as part of the analysis of whether the parish lost money or property that it would have otherwise retained. We do not read *Ratcliff* as requiring that the

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municipal license. . . . [W]hatever interests Louisiana might be said to have in its video poker licenses, the State's core concern is *regulatory*.") (emphasis in original).

[33] *See Ratcliff*, 488 F.3d at 645 ("Although the charged scheme involves Ratcliff ultimately receiving money from the parish, it cannot be said that the parish would be deprived of this money by means of Ratcliff's misrepresentations, as the financial benefits budgeted for the parish president go to the winning candidate regardless of who that person is.").

[34] *Id.* (citing *United States v. Pepper*, 51 F.3d 469, 473 (5th Cir. 1995)).

[35] *Id.* at 645-46 ("The misrepresentations simply do not implicate the parish's property rights.").

victim who loses money or property in a mail fraud scheme also be the party that was deceived by the defendant's scheme. This is contrary to the panel's recognition that misrepresentations need not be made directly to the victim, and it is contrary to sister circuit precedent. *See United States v. Christopher*[36] ("Nothing in the mail and wire fraud statutes requires that the party deprived of money or property be the same party who is actually deceived."); *United States v. Blumeyer*[37] ("[A] defendant who makes false representations to a regulatory agency in order to forestall regulatory action that threatens to impede the defendant's scheme to obtain money or property from others is guilty" of mail fraud.); *United States v. Kennedy*[38] (holding that the plain language of the mail fraud statute "requires only the devising of a *scheme* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises — not the making of misrepresentations to any particular individuals") (emphasis in original); *but see United States v. Lew* (holding that there must be "an intent to obtain money or property from the victim of the deceit").[39]

It is irrelevant for our purposes whether alleged misrepresentations about The Oath's financial

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[36] 142 F.3d 46, 54 (1st Cir. 1998).

[37] 114 F.3d 758, 768 (8th Cir. 1997).

[38] 64 F.3d 1465, 1476 (10th Cir. 1995).

[39] 875 F.2d 219, 222 (9th Cir. 1989).

condition were made to the state Department of Insurance or directly to the alleged victims of the scheme.[40] The issue is whether the victims' property rights were affected by the misrepresentations. We think they were.

The scheme alleged here was for the defendants to obtain money from The Oath and the insureds in the form of management fees and premiums, respectively, which was possible only because of The Oath's continued operation as a result of the fraudulent statements, and then to retain the money rather than pay it out to satisfy claims of the medical providers. We think this satisfies *Cleveland*'s requirement that the object of the fraud be actual money or property in the hands of the victim. It also satisfies *Ratcliff*'s requirement that the scheme be to defraud the victim insofar as victims were left without money that they otherwise would have possessed. But for the defendants' scheme to keep The Oath operating and to keep collecting premiums and fees, the medical services providers would not have been left with unpaid claims.[41] Other courts

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[40] We also note that The Oath's financial statements filed with the state were public documents available for review by the alleged victims. They were therefore at least indirect representations; e.g., the evidence showed that medical services providers reviewed and relied on those statements.

[41] *Cf. Christopher v. Miles*, 342 F.3d 378, 384 (5th Cir. 2003) ("The fraudulent acquisition of regulatory approvals was merely incidental to the broader purpose of the scheme – defrauding the

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have recognized that the deception of regulatory agencies for the purpose of allowing victimization of third parties is a cognizable mail fraud offense.[42] That is what happened here, as the defendants kept The Oath operating in violation of statutory requirements, only to have the HMO end up in liquidation with unpaid claims of more than $40 million.

The defendants similarly argue that even if the indictment is facially valid, the evidence at trial was insufficient to support a mail fraud conviction because the only misrepresentations proved in the case were made to the state Department of Insurance and there was no evidence that they obtained any money or property from any of the victims. But for reasons similar to our rejection of the defendants' challenge to the sufficiency of the indictment, we reject their sufficiency-of-the-evidence argument. The Government was not required to prove that misrepresentations were made directly to any of the victims.[43] It was also not required to prove that any

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insurance companies and their policyholders out of millions of dollars.").

[42] *See Blumeyer,* 114 F.3d at 767-68; *United States v. Cosentino,* 869 F.2d 301, 307 (7th Cir. 1989) ("[I]n misleading the Department of Insurance, the scheme permitted the agency to remain in business past the point it would have had the Department been aware of the defendants' activities – and that additional time allowed the defendants more time to take [the victim's] money. . . .").

[43] *See Ratcliff,* 488 F.3d at 645; *Pepper,* 51 F.3d at 473; *see also Kreuter v. United States,* 218 F.2d 532, 535 (5th Cir. 1955)

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victim actually suffered a loss, *see United States v. Loney,*[44] although we think the evidence did show losses by medical services providers that inured to the defendants. For example, Ken Keller, an executive with Tenet Health Systems, testified that Tenet lost millions of dollars when The Oath failed. Although Keller did not testify that money flowed directly from Tenet to The Oath, a rational jury could conclude that Tenet lost money because The Oath failed to pay Tenet for outstanding claims that were due.

The Government was required to prove only a scheme to defraud, the use of the mail or wire communications, and a specific intent to defraud.[45] The defendants' sufficiency-of-the-evidence argument focuses only on the target of the alleged misrepresentation, an argument which we conclude is unavailing. We therefore find the evidence was sufficient.

C.

Finally, the Defendants argue that the district court improperly allowed a constructive amendment

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("[I]t is not necessary to prove communication of the alleged false representations to the victims.").

[44] 959 F.2d 1332, 1337 (5th Cir. 1992) (holding that Government need not prove victim of fraud was actually harmed by showing a financial loss).

[45] *Id.*

of the indictment by permitting testimony that went beyond the indictment's allegations, and by refusing the defendants' request for a curative jury instruction. We review this claim *de novo*. *United States v. Alhalabi*.[46]

"[A]fter an indictment has been returned, its charges may not be broadened through amendment except by the grand jury itself." *United States v. Hoover*.[47] "A constructive amendment violates the defendant's right under the Fifth Amendment to a grand jury indictment." *United States v. Rubio*.[48] A constructive amendment "occurs when it permits the defendant to be convicted upon a factual basis that effectively modifies an essential element of the offense charged or permits the government to convict the defendant on a materially different theory or set of facts than that with which she was charged."[49]

Ken Keller, the regional director of managed care for Tenet Health Systems, one of The Oath's medical services providers, testified that he had general discussions with Scheur about The Oath's finances and the need for timely payment of claims. He said that Scheur told him The Oath's finances were in

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[46] 443 F.3d 605, 614 (7th Cir. 2006).

[47] 467 F.3d 496, 500 (5th Cir. 2006) (internal quotation marks and citation omitted).

[48] 321 F.3d 517, 521 (5th Cir. 2003).

[49] *Hoover*, 467 F.3d at 500-01 (internal quotation marks and citation omitted).

good shape. He also testified that he investigated The Oath's financial condition by researching and relying on the company's filings with the state Department of Insurance, and he explained the importance of getting accurate financial information about HMOs in order to make business decisions. Defendants objected to Keller's testimony because although the indictment alleged misrepresentations were made to the state Department of Insurance, it did not allege direct misrepresentations to medical services providers such as Keller. Defendants asked that the jury be instructed that it could not convict them unless it found that the state Department of Insurance had been defrauded. Defendants argue on appeal that the Government charged them with committing their offense in a specific manner and that without the requested jury instruction, the indictment was impermissibly broadened to allow the jury to convict them based on allegations that were not in the indictment. We disagree because we do not think this is a case where the indictment charged commission of an offense in one specific manner but the district court permitted a conviction based on another, entirely different manner. *See, e.g., Stirone v. United States.*[50]

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[50] 361 U.S. 212, 219, 80 S. Ct. 270, 274 (1960) (invalidating defendant's Hobbs Act conviction where indictment charged interference with interstate commerce of sand but trial court permitted conviction based on interference with interstate commerce of steel); *see also Hoover*, 467 F.3d at 502 (reversing conviction for making false statement where indictment charged

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The indictment here specifically charged that the defendants devised "a scheme or artifice to defraud and obtain money and property, specifically from . . . The Oath's medical services providers. . . ." We agree with the district court that Keller's testimony was probative of the defendants' scheme. Keller testified that his company lost money and that he had relied on The Oath's statements to the insurance department. The district court instructed the jury that the defendants were charged with defrauding the victims by misleading the state Department of Insurance and that the Government had to prove the crime was committed in the specific manner as alleged in the indictment. There was no mention of direct representations to medical services providers, and we conclude that the instructions did not permit a conviction based on a theory or set of facts materially different from that charged in the indictment.[51]

III.

Next, the defendants raise multiple claims of trial error. We conclude, however, that none of the

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defendant lied to federal agent by stating only one person told him about a "double flooring" problem when more than one person had actually done so, but trial judge instructed that defendant could be found guilty merely if he knew his statement was false rather than if more than one person told defendant about the problem).

[51] *See Hoover*, 467 F.3d at 500-01.

defendants' claims rises to the level of reversible error.

A.

The defendants contend that during the Government's rebuttal argument to the jury the prosecutor improperly commented on their election not to testify. They point to two specific comments. First, the prosecutor stated during rebuttal that "Not one of these defendants is stepping up and saying that they did anything wrong." Defense counsel immediately objected and moved for a mistrial. Counsel noted that the prosecutor had also gestured toward the defendants. The district court denied the motion but gave a curative instruction, stating that "no defendant need testify, they need put on no evidence, they need not put on anything at all." The court further stated that it "is always the government's burden to prove every essential element and the defendant need to prove nothing." The court instructed the jury to disregard the prosecutor's comment.

Then when rebuttal argument resumed, the prosecutor explained that he had misspoke and meant to refer to defense *counsel,* not the defendants:

> What I meant to say was here is that there is blame being played [sic] at the face of everybody in this courtroom but there's no responsibility at all being taken on behalf of the defendants. Okay. That's what was

> meant to be said here. The defense counsel, not the defendants, the defense counsel stepped up to this podium and blamed everybody in this courtroom. But not once did they explain to you, did they take responsibility for the actual items, the schemes in this case.

Defense counsel renewed the motion for a mistrial, which was denied.

"Prosecutors are prohibited from commenting directly or indirectly on a defendant's failure to testify in a criminal case." *United States v. Johnston.*[52] A remark will be found impermissible "if the prosecutor's manifest intent was to comment on the defendant's silence or if the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence."[53]

We have "set a high threshold for reversible error" based on alleged improper comments. *United States v. Sylvester.*[54] "Reversal is not warranted unless the improper comment had a clear effect on the jury." *United States v. Montoya-Ortiz.*[55]

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[52] 127 F.3d 380, 396 (5th Cir. 1997).

[53] *Id.*

[54] 143 F.3d 923, 929 (5th Cir. 1998) (addressing comment by witness about the defendant's failure to testify).

[55] 7 F.3d 1171, 1179 (5th Cir. 1993) (internal quotation marks and citation omitted).

We do not find reversal warranted here even if we assume that the prosecutor's comments improperly reflected on the defendants' failure to testify.[56] In context, we think the comments were more an isolated remark than a call for the jury to focus on the fact that the defendants did not testify. *See United States v. Griffith.*[57] Furthermore, the district court gave an immediate curative instruction that the Government bore the burden of proof and that the defendants need not testify or prove anything. Under similar circumstances, we have previously held that such an instruction cures any alleged harm from the prosecutor's improper remarks. *See United States v. Lampton.*[58] The district court also specifically instructed the jury both at the close of the Government's case and in its full jury charge that the defendants had a constitutional right not to testify and that the jury may draw no inferences from a defendant's election not to testify. That the jury heeded these instructions and was not inflamed by the prosecutor's comments is supported by the verdicts finding Scheur and McMillan guilty

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[56] *See Johnston,* 127 F.3d at 398 (subjecting improper comments to harmless error analysis and considering the prejudicial effect of comments, the efficacy of curative instructions, and strength of evidence of guilt).

[57] 118 F.3d 318, 325 (5th Cir. 1997) (holding remark "was an isolated comment, which did not 'strike at the jugular' of the defense, and which the jury was immediately instructed to disregard").

[58] 158 F.3d 251, 260 (5th Cir. 1998).

on some charges but not guilty on others, and by its full acquittal of another defendant. *See United States v. Saenz.*[59] We therefore do not see an error causing a clear effect on the jury and conclude that the prosecutor's comments failed to rise above the level of harmless error.

B.

Scheur, who has been blind since birth, next raises a due process challenge to the district court's failure to provide him with reasonable accommodations because it did not require the Government to produce its exhibits in Braille form and it later denied him a continuance to review voluminous new exhibits produced on the eve of trial. We review this claim *de novo. United States v. Williams.*[60]

There were over 150 exhibits in this case of some 900 pages that included quarterly reports, financial statements, accounting and bank records, and various pieces of correspondence displayed to the jury during testimony. Scheur argues that the failure to provide him with reasonable accommodations, such as Braille translations of the exhibits, prevented him from

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[59] 747 F.2d 930, 942-43 (5th Cir. 1984) ("That the jury was not inflamed is demonstrated by the fact that one defendant was acquitted on all charges and three other defendants acquitted on at least one charge. This indicates to us that the jury carefully weighed the evidence against each defendant, acquitting when the evidence was insufficient.").

[60] 343 F.3d 423, 439 (5th Cir. 2003).

following the testimony and assisting his counsel in analyzing the documents or confronting witnesses. He compares the district court's error to the denial of an interpreter for a defendant who cannot speak English or the denial of a sign translator for a deaf defendant.

We agree with Scheur that reasonable accommodations ought to be made to ensure that a defendant facing trial can comprehend the proceedings against him. *Cf. Drope v. Missouri.*[61] When faced with a defendant who is affected by blindness or deafness, the court "should afford such a defendant reasonable facilities for confronting and cross-examining the witnesses as the circumstances will permit." *People ex rel. Myers v. Briggs.*[62] Determining what is reasonable is done based on the totality of the circumstances and involves a "basic balancing of [the defendant's] rights under the Sixth Amendment against the public's interest in the administration of criminal law." *Ferrell v. Estelle.*[63] The Constitution

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[61] 420 U.S. 162, 171, 95 S. Ct. 896, 903 (1975) (stating that test for mental competency requires that defendant have capacity to understand nature and object of proceedings against him, to consult with counsel, and to assist in his defense). Scheur does not challenge on appeal the district court's finding that he was competent to stand trial, and instead raises the more narrow argument that the denial of reasonable accommodations denied him the ability to comprehend the exhibits, follow the testimony, and assist in his defense.

[62] 263 N.E.2d 109, 113 (Ill. 1970).

[63] 568 F.2d 1128, 1132 (5th Cir.), *opinion withdrawn on other grounds,* 573 F.2d 867 (5th Cir. 1978).

does not require "a perfect trial" or that defendants understand the proceedings with the "precision of a Rhodes Scholar;" rather, "[t]he Constitution requires that a defendant sufficiently understand the proceedings against him to be able to assist in his own defense."[64] While we are sympathetic to Scheur's physical impairment, we conclude that Scheur was not subject to a fundamentally unfair trial.

It may be true that Scheur could not see the Government's exhibits displayed to the jury during testimony, but the exhibits were not a complete surprise to him. As the district court noted, Scheur and defense counsel had access to most of the Government exhibits at least three weeks prior to trial, which was the deadline for disclosure in the district court' scheduling order. In addition, this prosecution had been ongoing for nearly three years, yet Scheur did not raise an issue about his inability to comprehend exhibits until the eve of trial. Moreover, many of the exhibits came from The Oath's own files or were the subject of civil litigation that resulted from The Oath's failure and that had been ongoing for several years. We agree with the district court that as the company's President and Chief Executive Officer, Scheur either was presumed to have knowledge of those exhibits or ignored their contents at his peril.

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[64] *Id.* at 1131-32.

We are also mindful that Scheur is a sophisticated and well-educated businessman and lawyer.[65] He has worked as in-house counsel for health care organizations, consulted for state insurance regulators, and operated multiple businesses during his long career, and he has had to contend with complex documents throughout his professional life. He testified during a pre-trial hearing to consider his need for accommodations that in the past he has relied heavily on other people to synthesize and present information to him in summary fashion. While he could not see the exhibits as they were displayed to the jury, he could hear the testimony about them and assist his counsel during the trial. While listening to the testimony is perhaps not as effective as actually seeing the exhibits, this situation is unlike a deaf or a non-English speaking defendant who would have no understanding whatsoever of the proceedings against him without an interpreter. Furthermore, Scheur challenges the Government's exhibits in their entirety but fails to address in his brief the district court's finding that many of the exhibits came from The Oath. Our review of the record confirms this finding. The failure to provide Braille translations of exhibits that came from Scheur's own company or to which he had sufficient access did not render the trial fundamentally unfair.

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[65] The record shows that Scheur graduated magna cum laude from Tufts University and later graduated from Yale Law School.

Scheur also complains, however, that just six days before trial the Government produced approximately 3,000 pages of new exhibits, including witness statements and grand jury testimony, to which he did not previously have access. He contends that it was physically impossible for him to review these documents before trial and that the district court erroneously denied his request for a continuance so that they could be translated into Braille. Again, we are sympathetic to Scheur but find no reversible error. We think any defendant, with or without a physical impairment, could have had difficulty reviewing the voluminous new exhibits, but Scheur does not contend that the Government produced the material impermissibly late. In fact, the Government asserted at oral argument that it produced the new exhibits, which included *Jencks* Act material, in accord with the local rules. As the Government pointed out, everyone knew that this material would be forthcoming, yet Scheur never asked that it be produced earlier or that it be translated into Braille before trial. Moreover, Scheur points out no exhibit or statement that caused a disadvantage to his defense because the Government did not produce it sooner. Finally, at least some, though not all, of the new material also came from The Oath's own files. We are left then with the district court's denial of a request for a continuance on the eve of trial, but we conclude

that Scheur has not demonstrated the requisite abuse of discretion or prejudice. *See United States v. Scott.*[66]

In sum, the right to due process " 'is, in essence, the right to a fair opportunity to defend against the State's accusations.' "[67] We conclude that Scheur had a fair opportunity to defend his case, and we note that the case was very well-tried on both sides. The due process challenge is unavailing.[68]

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[66] 48 F.3d 1389, 1393 (5th Cir. 1995) ("This court will reverse a district court's decision denying a defendant's motion for continuance only when the district court has abused its discretion and the defendant can establish that he suffered serious prejudice.") (internal quotations and citation omitted).

[67] *Ferrell,* 568 F.2d at 1131 (quoting *Chambers v. Mississippi,* 410 U.S. 284, 294, 93 S. Ct. 1038, 1045 (1973)).

[68] Amici argue that the Government violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), by failing to produce its exhibits in Braille form because regulations governing the Department of Justice require the Department to "furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency." 28 C.F.R. § 39.160(a)(1). We need not decide whether a criminal prosecution is included within the kind of program or activity intended to be covered by this anti-discrimination regulation because this issue was never presented in the district court and is not properly before us. *See Stephens v. Zant,* 716 F.2d 276, 277 (5th Cir. 1983). Furthermore, as we concluded above, we find that Scheur had an adequate opportunity to participate in his own defense.

C.

The defendants next argue that the district court violated its role as gatekeeper for expert evidence by allowing three fact witnesses – Alan Parker, John Black, and Roland Sheehan – to give opinions based on Louisiana's statutory accounting rules when the witnesses were not qualified as experts in Louisiana law. They contend that the testimony should have been excluded as improper expert testimony. We find no abuse of discretion by the district court. *See United States v. Watkins.*[69]

If a witness is called upon to provide an expert opinion because the witness's specialized knowledge may assist the jury's understanding of the issues, the district court is required by its gatekeeping role to ensure that the expert is properly qualified and that the testimony is reliable.[70] A witness who provides only lay testimony may give limited opinions that are

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[69] 591 F.3d 780, 786 (5th Cir. 2009) ("When an objection is properly made, we review a district court's evidentiary rulings for an abuse of discretion."); *see also United States v. Hicks*, 389 F.3d 514, 524 (5th Cir. 2004) ("This court reviews a district court's decision to admit expert testimony under an abuse-of-discretion standard.").

[70] FED. R. EVID. 702; *see Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93, 113 S. Ct. 2786, 2796 (1993) (requiring district court to consider expert testimony by assessing "whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue"); *see also United States v. Cooks*, 589 F.3d 173, 179-80 (5th Cir. 2009) (explaining district court's gatekeeper role).

based on the witness's perception and that are helpful in understanding the testimony or in determining a fact in issue, but the witness may not opine based on scientific, technical, or other specialized knowledge.[71]

Although Parker, Black, and Sheehan were not experts in Louisiana law, the defendants complain that the district court failed to conduct a proper *Daubert* analysis before permitting the witnesses to opine about the application of Louisiana accounting rules to The Oath, such as whether The Oath should have reported certain cash infusions and receivables as assets affecting net equity. They assert that these witnesses gave improper testimony based on the law of other states rather than Louisiana. We disagree that the witnesses gave improper expert testimony.

Alan Parker, a certified public accountant, worked at an HMO in Alabama that Scheur subsequently purchased. Scheur asked Parker to examine The Oath's second quarter 2000 accounting reports prior to submission to the state Department of Insurance, and Scheur later hired him to work at The Oath as interim CFO. Parker also was privy to The Oath's compilation of its third quarter accounting reports. Parker testified about The Oath's booking of assets on those reports, the effect on net equity, and what he told Scheur about his opinions of The Oath's reporting. Although Parker defined certain accounting terms during the course of his testimony,

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[71] *See Cooks*, 589 F.3d at 179-80; FED. R. EVID. 701.

he provided factual information about the circumstances of the case and his interaction with Scheur.

John Black, a former insurance regulator in Florida, was also hired by Scheur, specifically to investigate possible recoveries of claims from Medicare that The Oath could book as receivable assets. His testimony generally concerned this investigation and the conclusions he reached about possible receivables. Both Black and Parker properly testified as fact witnesses about their observations and perceptions in the case in response to specific solicitations from Scheur. *See, e.g., United States v. Rigas.*[72]

Roland Sheehan was an auditor hired by the state Department of Insurance to conduct a targeted review of The Oath's financial statements, specifically its assets. He testified about his actions in reviewing The Oath's assets and his finding that certain claimed receivables on the statements did not qualify as admitted assets. This factual testimony about Sheehan's investigation was also not impermissible

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[72] 490 F.3d 208, 224 (2d Cir. 2007) ("A witness's specialized knowledge, or the fact that he was chosen to carry out an investigation because of this knowledge, does not render his testimony 'expert' as long as it was based on his 'investigation and reflected his investigatory findings and conclusions, and was not rooted exclusively in his expertise. . . .'") (citation omitted); *see also United States v. Miranda*, 248 F.3d 434, 441 (5th Cir. 2001) (holding that witness with "extensive participation" in an investigation could testify about opinions and personal perceptions formed therefrom).

expert testimony.[73] To the extent that some of the witnesses' testimony may have implicated specialized knowledge by defining certain accounting terms and discussing standardized accounting guidelines, we conclude that the error in allowing the testimony, if any, was harmless because in the context of the entire trial we see no reasonable basis to find an effect on the jury's verdict. *See United States v. Yanez Sosa.*[74] We therefore find no reversible error in the district court's evidentiary rulings.[75] Because we find no error, we also reject the defendant's assertion that the district court failed to give a curative instruction to the jury about the witnesses' testimony.

Having considered the defendants' claims of trial error, we find no basis for reversal of the convictions.[76]

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[73] *See Rigas*, 490 F.3d at 224.

[74] 513 F.3d 194, 201 (5th Cir. 2008) (holding that improper admission of expert testimony is subject to harmless error analysis).

[75] The defendants assert in a one-sentence footnote that the district court improperly admitted expert testimony from four other witnesses. We decline to review this argument as conclusory and inadequately briefed. *See United States v. Charles*, 469 F.3d 402, 408 (5th Cir. 2006) ("A single conclusory sentence in a footnote is insufficient to raise an issue for review."). We also refuse to consider the defendants' argument that the testimony of Parker, Black, and Sheehan should have been excluded under Federal Rules of Evidence 401 and 403 because this argument is also inadequately briefed. *See United States v. Lindell*, 881 F.2d 1313, 1325 (5th Cir. 1989); FED. R. APP. P. 28(a)(9).

[76] The defendants also assert a claim of cumulative error, but because we find no merit in the individual claims we reject

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The district court's judgments are therefore affirmed. We turn next to the Government's cross-appeal.

IV.

The Government argues in its cross-appeal that both Scheur's and McMillan's sentences are unreasonable. More specifically, it contends that the district court erroneously calculated the defendants' Sentencing Guidelines ranges based on an incorrect determination of the loss caused by the offense and that the district court erroneously failed to order the payment of restitution.

We ordinarily engage in a bifurcated analysis of a sentence imposed by the district court. *United States v. Delgado-Martinez.*[77] We first examine whether the district court committed any procedural errors, including its calculation of the Guidelines range, before considering the substantive reasonableness of the sentence. *See Gall v. United States.*[78] The Government challenges only the district court's calculation of the Guidelines ranges and makes no argument about substantive reasonableness.

We review a district court's interpretation or application of the Sentencing Guidelines *de novo* and

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the cumulative error claim. *See United States v. Stephens*, 571 F.3d 401, 412 (5th Cir. 2009).

[77] 564 F.3d 750, 752 (5th Cir. 2009).

[78] 552 U.S. 38, 51, 128 S. Ct. 586, 597 (2007).

its factual findings for clear error. *United States v. Cisneros-Gutierrez.*[79] "Factual determinations regarding loss amount for guideline calculation purposes are reviewed for clear error." *United States v. Ollison.*[80] "A factual finding is not clearly erroneous as long as it is plausible in light of the record read as a whole." *United States v. Krenning.*[81] "The court need only make a reasonable estimate of the loss . . . based on available information."[82]

When calculating the defendants' Guidelines ranges, the district court rejected the Government's argument that it should apply a 22-level sentence enhancement under U.S.S.G. § 2B1.1(b)(1)(L) based on a loss amount of over $40 million, which was the amount by which The Oath's liabilities exceeded its assets when it was placed in liquidation.[83] The court reasoned that The Oath was a financially troubled company at the time Scheur acquired it and that it would have suffered losses even if it had ceased operations immediately rather than be sold to Scheur. Although the court believed the defendants' fraud allowed the company to keep operating and caused

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[79] 517 F.3d 751, 764 (5th Cir. 2008).

[80] 555 F.3d 152, 164 (5th Cir. 2009).

[81] 93 F.3d 1257, 1269 (5th Cir. 1996).

[82] U.S.S.G. § 2B1.1 cmt. n.2(C) (2001).

[83] *See* U.S.S.G. § 2B1.1(b)(1)(L) (2001) (providing for a 22-level enhancement for a loss that is more than $20 million but not more than $50 million). The 2001 version of the Sentencing Guidelines was applicable in this case.

additional losses, it concluded that the amount of loss actually caused by the defendants' conduct could not reasonably be calculated.[84] Instead, the court determined that the defendants' gain from the offense, represented by their respective salaries, should be used as an alternative measure when calculating the offense levels.[85] The court accepted as reasonable the defendants' estimate that Scheur made approximately $199,000 in salary from his work at The Oath during the period following the fraudulent corporate filings, while McMillan made approximately $130,000. The court therefore applied a 10-level sentence enhancement and determined that Scheur's Guidelines range was 97 to 121 months and that McMillan's Guidelines range was 78 to 97 months.[86] The district court departed downward from the Guidelines ranges and sentenced Scheur to 20 months and McMillan to 13 months.

The Government does not challenge the district court's departure from these ranges, and it argues

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[84] *See United States v. Olis*, 429 F.3d 540, 545-46 (5th Cir. 2005) (holding that a defendant convicted of an economic crime is "responsible at sentencing only to the extent that losses are caused directly by the offense conduct").

[85] *See* U.S.S.G. § 2B1.1 cmt. n.2(B) (2001) (providing that the gain resulting from an offense should be used as an alternative measure of loss if there is a loss but it reasonably cannot be determined).

[86] *See* § 2B1.1(b)(1)(F) (providing for a 10-level enhancement when the offense results in a loss of more than $120,000 but not more than $200,000).

only that the court should have applied the 22-level enhancement. It reasons that The Oath was solvent when Scheur took over but was worth negative $41 million when it was liquidated, which it argues is the actual loss caused by the offense. The Government contends that had the defendants provided truthful information in the financial statements the Department of Insurance could have taken prompt corrective action sooner, and no losses would have been suffered because all outstanding claims owed to medical services providers could have been paid.

The district court conducted a loss determination hearing at which The Oath's financial condition prior to Scheur's involvement was hotly contested, and there is conflicting evidence in the record. At the loss hearing, Denise Brignac, the Louisiana Department of Insurance Assistant Chief Examiner, testified that on December 31, 2000, before Scheur's acquisition of the company, The Oath reported being above the statutory reserve requirement and was solvent. She also testified that the plan was "struggling financially" and the owners were considering the option of ceasing business and paying off all outstanding claims. As part Scheur's acquisition of the company, the prior owners had to infuse millions of dollars in additional capital just to complete the transfer of ownership. There was also testimony that in 1999 The Oath was losing millions upon millions of dollars and was on the verge of failure. The company lost $27 million in 1999 alone. Brignac acknowledged that in 1999 the company had under-reserved for claims by

the amount of $44 million. Given the contradictory testimony and the hotly disputed nature of the issue, we cannot conclude that the district court clearly erred by finding that The Oath would have suffered catastrophic losses had it been closed rather then permitted to continue in operation and that the amount of loss attributable solely to the defendants could not be reasonably calculated.

As an alternative argument, the Government asserts that the district court improperly calculated the amount of the defendants' gain. Rather than basing the gain on Scheur's and McMillan's salaries, as the district court did, the Government urges that the gain should have been the $6.1 million in management fees paid to SMG, Scheur's consulting company. The district court rejected this argument because it concluded that the majority of the management fees were actually used for management of The Oath to pay employees' salaries and other administrative expenses. As such, the fees represented no gain to the defendants. The court reasoned that The Oath was not a sham corporation. Although the defendants' fraud allowed The Oath to continue operating in violation of state regulatory requirements for net worth, the company otherwise was a legitimate business that provided healthcare coverage to its insureds, none of whom ever lost coverage. We agree with the district court's reasoning about the management fees and conclude that they did not represent a gain to the defendants. The district court

did not clearly err in its determination of the defendants' gain. *See, e.g., United States v. Smithson.*[87]

Finally, the Government contends that under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, the district court was required to order restitution. The district court's decision with respect to restitution is reviewed for an abuse of discretion.[88] A restitution order "must be limited to losses caused by the specific conduct underlying the offense of conviction." *United States v. Arledge.*[89] The award may encompass "only those losses that resulted directly from the offense for which the defendant was convicted."[90] Because we conclude that the district court did not err in determining that the amount of the loss attributable to the defendants' fraud could not reasonably be determined, the district court did not abuse its discretion by finding restitution inapplicable.[91] We therefore find no merit in the

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[87] 49 F.3d 138, 144 (5th Cir. 1995) ("compensation for legal services . . . not performed in furtherance of the fraudulent concealment cannot be considered gain to the appellants") (footnote omitted); *cf. Olis*, 429 F.3d at 545-46.

[88] *Ollison*, 555 F.3d at 164; *see also United States v. Gupta*, 572 F.3d 878, 887 (11th Cir. 2009).

[89] 553 F.3d 881, 899 (5th Cir. 2008).

[90] *Id.* at 898 (internal quotation marks and citation omitted).

[91] *See also* 18 U.S.C. § 3663A(c)(3)(B) (providing that restitution is inapplicable if "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the

(Continued on following page)

Government's cross-appeal of the defendants' sentences.

The district court's judgments are AFFIRMED.

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need to provide restitution to any victim is outweighed by the burden on the sentencing process").

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-31148

UNITED STATES OF AMERICA

Plaintiff – Appellee-Cross-Appellant

v.

ROBERT MCMILLAN; BARRY S. SCHEUR

Defendants – Appellants-Cross-Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans

ON PETITIONS FOR REHEARING EN BANC

(Filed Apr. 12, 2010)

(Opinion 3/11/10, 5 Cir., _____, _____, F.3d _____)

Before REAVLEY, DAVIS, and STEWART, Circuit Judges.

PER CURIAM:

(X) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En

Banc (Fed. R. APP. P. and 5th CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

( ) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. APP. P. and 5th CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

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(2)

Supreme Court, U.S.
FILED
SEP 15 2010
OFFICE OF THE CLERK

No. 10-85

In the Supreme Court of the United States

BARRY SCHEUR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's accommodations for petitioner's blindness were constitutionally deficient.

2. Whether the prosecutor's comments during rebuttal argument constituted reversible error.

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In the Supreme Court of the United States

No. 10-85

BARRY SCHEUR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-48) is reported at 600 F.3d 434.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2010. A petition for rehearing was denied on April 12, 2010 (Pet. App. 49-50). The petition for a writ of certiorari was filed on July 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Eastern District of Louisiana of conspiring to commit mail and wire fraud, in violation of 18 U.S.C. 371; three substantive counts of mail fraud, in violation of 18 U.S.C. 1341; and four sub-

stantive counts of wire fraud, in violation of 18 U.S.C. 1343. He was sentenced to 20 months of imprisonment, to be followed by two years of supervised release. Pet. C.A. R.E. Tab 5, at 1-3. The court of appeals affirmed. Pet. App. 1-48.

1. Petitioner is the former owner, president, and chief executive officer of The Oath for Louisiana, a Louisiana health maintenance organization. State law requires all such organizations to maintain a net worth of at least $3 million as a cushion for claims and to file detailed quarterly and annual financial reports with the state insurance department. Beginning in the third quarter of 2000, petitioner and his co-defendant Robert McMillan, another company officer, caused to be filed false financial reports that included speculative, nonexistent, and misreported assets in order to make it appear that The Oath met the statutory net-worth requirement. This scheme enabled them to keep the company running without regulatory interference, which in turn allowed the company to continue to collect premiums from insureds and to pay hundreds of thousands of dollars in monthly management fees to petitioner's consulting firm. Pet. App. 2-6.

The state insurance department began to discover The Oath's true financial condition towards the end of 2001. By the time it placed the company in receivership in April 2002, the company's liabilities, much of which consisted of debt to medical services providers, exceeded the company's assets by over $40 million. Petitioner's consulting firm had received roughly $6.1 million in fees from the company. Pet. App. 6.

2. A federal grand jury in the Eastern District of Louisiana returned a 14-count indictment against petitioner, McMillan, and two other defendants (one of

whom later pleaded guilty), charging conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 371; five counts of substantive mail fraud, in violation of 18 U.S.C. 1341; and eight counts of substantive wire fraud, in violation of 18 U.S.C. 1343. Pet. C.A. R.E. Tab 3A 1-16.

3. a. Just over a month before trial, the government informed the district court that petitioner is blind. In a subsequent pretrial status conference, the court attempted to ascertain what accommodations petitioner might need during trial. Petitioner's counsel refused to provide any information, claiming that any statements might infringe on petitioner's Fifth Amendment rights. Pet. C.A. R.E. Tab 8, at 4 & n.5 (4/24/2008 Order); *id.* at 5 n.6.

The government then filed a motion in limine regarding potential issues that could arise at trial due to petitioner's blindness. 07-169 Docket entry No. 130 (E.D. La. filed Apr. 1, 2008). In response, petitioner stated that he "will be able to follow the oral testimony at the trial" and that "[d]ue process will be satisfied by the government providing [him] with certified Braille translations of the exhibits it intends to use, sufficiently in advance of trial to allow him to review them." 07-169 Docket entry No. 150, at 2 (filed Apr. 9, 2008). Less than two weeks before trial was scheduled to begin, however, petitioner moved for an expedited competency hearing under 18 U.S.C. 4241, "arguing that his disability prevented him from understanding the nature and consequences of the proceedings against him and from assisting properly in his defense." 07-169 Docket entry No. 184 (filed Apr. 16, 2008); 4/24/2008 Order 5.

After additional briefing and an expedited hearing, at which petitioner and an expert testified, the district

court issued a written order finding petitioner competent to stand trial. 4/24/2008 Order 7-10. The district court determined that petitioner has two primary methods to absorb written information—reading Braille and listening—and that both methods can be used to meaningfully convey the contents of financial documents. *Id.* at 8-10. Many of the documents at issue were from petitioner's own company, and petitioner "testified that he relies heavily on other people to synthesize and present information to him in a summary fashion." *Id.* at 10. The court concluded: "In sum, having dealt with the reality of not being able to see financial documents his entire professional career, but nevertheless having engaged in, and become an expert (according to his own web site) in, advising and running healthcare companies, [petitioner] simply cannot come to this Court on the eve of trial purporting to be incompetent on this ground." *Ibid.*

The district court also explained the accommodations it intended to provide petitioner at trial. 4/24/2008 Order 11-15. It permitted petitioner to use his hand-held Braille computer at all times during the trial, allowed him to use Braille translations of exhibits if he testified (provided that such translations were produced to the government at least three days before his testimony), and required the government to turn over at least three days in advance any Braille documents intended for use in cross-examining him. *Id.* at 14. The district court did not, however, require the government to provide Braille translations of all of its proposed exhibits. *Ibid.* The district court observed that the government had produced its proposed exhibits over three weeks before trial and that petitioner had access to many of them years before that, either because they were part of his com-

pany's files or because they were at issue in related litigation. *Ibid.* It further observed that petitioner had failed to take advantage of the opportunity to review the exhibits using methods he had used throughout his career, instead choosing to "come to this Court seeking to be declared incompetent or, alternatively, to force the government to reproduce these documents manually in an alternate form." *Id.* at 10, 15. Under the circumstances, the district court concluded, petitioner had "already been provided a reasonable opportunity to obtain the benefit of his constitutional rights" to assist in his own defense and confront the witnesses against him, and did not require further accommodation. *Id.* at 15 (internal quotation marks and citation omitted).

Three days before trial, petitioner moved for a continuance because the government had updated its exhibit disclosure within the preceding four days, as the district court's scheduling order required it to do. See 07-169 Docket entry No. 64, at 2 (filed Nov. 30, 2007); 07-169 Docket entry No. 228 (filed Apr. 25, 2008). The government responded that many of the added exhibits, including the lengthiest ones, were documents from The Oath's own files. 07-169 Docket entry No. 234, at 2 (filed Apr. 25, 2008); Gov't C.A. Br. 66. The district court denied the continuance motion without comment. Pet. C.A. R.E. Tab 9.

On the second day of trial, petitioner moved for a mistrial on the ground that he could not adequately follow, comment on, and assist his counsel in analyzing the evidence. The district court, reiterating the reasoning set forth in its prior order, denied the motion. 4/29/2008 Afternoon Tr. 37-38, 73-74.

b. Neither petitioner nor his co-defendants testified at trial. Pet. App. 29. In closing arguments, their sepa-

rate counsel all sought to deflect blame to various other actors. 5/7/2008 Tr. 32-52, 62-66, 70-74; Gov't C.A. Br. 74-75. The prosecutor responded in rebuttal argument by telling the jury:

> Ladies and gentlemen, over the past hour and 45 minutes you've heard a lot of outrage, a lot of outrage by the defendants in this case. * * * What you've seen from the defense here is attack, blame the Department of Insurance, blame [a particular state regulator], blame the accountants, blame the lawyers, blame the government. Not one of these defendants is stepping up and saying that they did anything wrong.

5/7/2008 Tr. 77.

The defense objected and moved for a mistrial. 5/7/2008 Tr. 77-78. The district court denied the motion, but immediately delivered a curative instruction:

> I specifically instructed you before that no defendant need testify, they need put on no evidence, they need not put on anything at all. It is always the government's burden to prove every essential element and the defendant need to prove nothing. So you're to disregard that last comment. The defendant need not say anything, so disregard that and we'll continue with the argument.

Id. at 78-79. The defendants did not seek an additional, or different, curative instruction. See *ibid.*

Resuming his argument, the prosecutor explained to the jury:

> Ladies and gentlemen, I misspoke. What I meant to say was * * * is that there is blame being played at the face of everybody in this courtroom but there's

> no responsibility at all being taken on behalf of the defendants. Okay. That's what was meant to be said here.
>
> The defense counsel, not the defendants, the defense counsel stepped up to this podium and blamed everybody in this courtroom. But not once did they explain to you, did they take responsibility for the actual items, the schemes in this case.

5/7/2008 Tr. 79. No defendant objected to this explanatory statement. See *ibid.*; Gov't C.A. Br. 76.

Before the case went to the jury, the defendants renewed their motion for a mistrial, contending that the prosecutor had "turned and very aggressively gestured toward the defendants as he made a statement that clearly, irrespective of what his intent was, conveyed a message to the jury that there was something to hide by the fact that the defendants didn't take the stand." 5/7/2008 Tr. 93.[1] They did not mention the prosecutor's second, explanatory statement, nor did they object to the district court's curative instruction. *Ibid.* The district court denied the renewed motion. *Ibid.*

In its final instructions, the district court informed the jury that "[t]he law does not require a defendant to prove his or her innocence or to produce any evidence at all. In fact, a defendant has a constitutional right not to testify; and if the defendant chooses not to testify, no

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[1] Other than this statement by defense counsel, which the district court neither agreed with nor acknowledged, the record contains no support for petitioner's assertion—which the government disputes, see Gov't C.A. Br. 75 n.21—that the prosecutor "turned toward the three defendants, raised his voice," and "gestured at them" while making the remark at issue. Pet. 6.

inferences whatever may be drawn from the election of the defendant not to testify." 5/8/2008 Tr. 4.

c. The jury found petitioner guilty on the conspiracy count, three of the mail fraud counts, and four of the wire fraud counts. Pet. App. 8. The district court, citing its previous rulings on the issue, denied a post-trial motion for acquittal or a new trial in which petitioner argued that his due process rights were violated because he did not receive reasonable accommodations for his blindness. Pet. C.A. R.E. Tab 11, at 2-4, 9-10.

The Sentencing Guidelines range for petitioner's sentence was 97 to 121 months of imprisonment. The district court, however, sentenced petitioner to 20 months of imprisonment, to be followed by two years of supervised release. Pet. App. 44; Pet. C.A. R.E. Tab 3A 2 3.

3. The court of appeals affirmed. Pet. App. 1-48. It held that the district court had not violated petitioner's due process rights by failing to provide reasonable accommodations for his blindness. See *id.* at 32-37. As to petitioner's argument that the district court should have required the government to provide Braille copies of all of its exhibits, the court of appeals observed that even though the "prosecution had been ongoing for nearly three years," petitioner "did not raise an issue about his inability to comprehend exhibits until the eve of trial"; that petitioner had access to most of the exhibits at least three weeks before trial; that many of the exhibits came from The Oath's own files or were the subject of long-running related litigation, so petitioner should have been familiar with them; that petitioner had frequently encountered documents of similar complexity in his professional life and had relied on others to present oral summaries; and that petitioner could hear testimony about the exhibits and assist his attorney during trial. *Id.* at

34-35. As to petitioner's argument that the district court should have granted a continuance when the government produced additional exhibits shortly before trial, the court of appeals found no abuse of discretion, observing that the government produced the material in timely fashion; that petitioner had known the material was coming but never asked ahead of time that it be produced earlier or that Braille translations be provided; that some of the material came from the Oath's own files; and that petitioner could not identify any "exhibit or statement that caused a disadvantage to his defense because the Government did not produce it sooner." *Id.* at 36-37. The court of appeals concluded that, under the circumstances, petitioner "had a fair opportunity to defend his case," *id.* at 37, and "was not subject to a fundamentally unfair trial," *id.* at 34.

The court of appeals also held that the prosecutor's statements during rebuttal argument did not constitute reversible error. See Pet. App. 29-32. Even "assum[ing] that the prosecutor's comments improperly reflected on the defendants' failure to testify," the court of appeals determined that, "[i]n context, * * * the comments were more an isolated remark than a call for the jury to focus on the fact that the defendants did not testify." *Id.* at 31. The court of appeals additionally observed that the district court gave an "immediate curative instruction" and twice—once at the close of the government's case and once in the full jury charge—instructed the jury not to draw any inferences from a defendant's exercise of his right not to testify. *Ibid.* "That the jury heeded these instructions and was not inflamed by the prosecutor's comments," the court of appeals said, "is supported by the verdicts finding [petitioner] and McMillan guilty on some charges but not on others, and

by its full acquittal of another defendant." *Id.* at 31-32. In sum, the court of appeals saw no "error causing a clear effect on the jury" and concluded "that the prosecutor's comments failed to rise above the level of harmless error." *Id.* at 32.[2]

ARGUMENT

Petitioner renews (Pet. 9-25) his claims that he was denied constitutionally required accommodations for his blindness and that the government impermissibly commented on his decision not to testify. The court of appeals correctly rejected both claims. Its decision does not conflict with any decision of this Court or of another court of appeals, and further review is unwarranted.

1. Petitioner contends (Pet. 9-17) that his constitutional rights were violated because the accommodations provided by the district court for his blindness were inadequate. That fact-bound contention lacks merit.

The court of appeals recognized that "reasonable accommodations ought to be made to ensure that a defendant facing trial can comprehend the proceedings against him." Pet. App. 33. It furthermore recognized that a failure to provide sufficient accommodations might amount to a denial of due process. *Id.* at 33-34 & n.61. But it determined that in the particular circumstances of this case, petitioner "was not subject to a fundamentally unfair trial." *Id.* at 34.

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[2] The court of appeals also rejected petitioner's and McMillan's claims that the indictment was untimely, that the indictment and evidence were insufficient, that the indictment was constructively amended, and that the district court erroneously allowed lay witnesses to present expert opinion testimony. See Pet. App. 9-28, 38-42. Petitioner does not renew those claims in this Court. McMillan has filed a separate petition for a writ of certiorari (No. 10-5263), which petitioner has not joined.

Those circumstances, as observed by the court of appeals and the district court, included the following: It was the government, not petitioner, that first brought petitioner's disability to the district court's attention. 4/24/2008 Order 4 & n.5. Petitioner waited until the "eve of trial," nearly three years after the original indictment, to raise the accommodation issue with the district court. Pet. App. 34; cf. *Yakus* v. *United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right."). Petitioner and his counsel had access to most of the exhibits at least three weeks before trial, and did not make good use of that time. Pet. App. 34; 4/24/2008 Order 15. Petitioner in fact had access to many of the documents long before that, as they either were from his company's own files or had been the subject of related litigation. Pet. App. 34; 4/28/2008 Order 14. Petitioner knew ahead of time that a supplemental production would arrive less than a week before trial,[3] yet never sought any accommodation before that production was made. Pet. App. 36. Petitioner, who in his professional life "relied heavily on other people to synthesize and present information to

[3] The court of appeals noted that the government asserted at oral argument that the new exhibits, which included Jencks Act material, were produced in accord with the local rules. Pet. App. 36; 18 U.S.C. 3500. Petitioner argues that "*there is no local rule* on the topic." Pet.16 (emphasis in original). In fact, at oral argument the government stated that the exhibits were produced in accord with common practice in the district, as well as an agreement between the parties. Oral argument recording: *United States* v. *McMillan*, No. 08-31148, at 38:30 to 39:00 (Feb. 1, 2010), http://www.ca5.uscourts.gov/OralArgumentRecordings/08/08_31148_2-1-10.wma. The court of appeals' reference to a "local rule" rather than "local practice" did not affect its ultimate conclusion.

him in summary fashion," could hear the oral testimony presented about the exhibits at trial. *Id.* at 35. Petitioner could highlight to no specific instances in which the admission of an exhibit without a Braille translation, or the late production of an exhibit, prejudiced his defense. *Id.* at 35-36; see Pet. 9-17.

The court of appeals did not err in concluding that petitioner "had a fair opportunity to defend his case" and "an adequate opportunity to participate in his own defense." Pet. App. 37 & n.68. Petitioner does not identify a conflict between that determination and any decisions of this Court or the other courts of appeals. His claim accordingly warrants no further review.

2. Petitioner also renews (Pet. 18-25) his argument that the prosecutor's remark in rebuttal argument that "[n]ot one of these defendants is stepping up and saying that they did anything wrong" constituted reversible error. The court of appeals correctly rejected that argument, and there is no reason for this Court to review that fact-bound decision.

Petitioner first asserts (Pet. 18-19) that the courts of appeals are not applying this Court's decision in *Griffin* v. *California*, 380 U.S. 609 (1965), uniformly. According to petitioner, "the line between what constitutes an impermissible comment" on a defendant's silence "and what does not is unintelligible." Pet. 19. But even assuming that were so, it would have no bearing on this case. The court of appeals concluded that there was no reversible error "*even if* [*it*] *assume*[*d*] that the prosecutor's comments"—which, the prosecutor clarified, were intended to refer only to defendants' counsel—"improperly reflected on the defendants' failure to testify." Pet. App. 31 (emphasis added).

Petitioner additionally asserts (Pet. 22-23) that the district court's curative instruction was inadequate because it did not expressly tell the jury not to draw any negative inferences from the defendants' silence. Petitioner, however, never requested a different curative instruction. 5/7/2008 Tr. 79, 93. Furthermore, as the court of appeals observed, the district court twice instructed the jury—once before closing arguments and once after—not to read anything into the defendants' exercise of their Fifth Amendment rights. Pet. App. 31; cf. *Kentucky* v. *Whorton*, 441 U.S. 786, 789 (1979) (per curiam) (claim of constitutional error arising from failure to give instruction "must be evaluated in light of the totality of the circumstances—including all the instructions to the jury"). Petitioner's claim (Pet. 22-23) that the court of appeals' reasoning on this issue conflicts with a different decision of the same court, *United States* v. *Griffith*, 118 F.3d 318 (5th Cir. 1997), does not merit review. Not only would any intra-circuit conflict be for the court of appeals, not this Court, to resolve, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), no conflict exists. In *Griffith*, unlike this case, the jury was *never* instructed that a defendant has a constitutional right not to testify and that no adverse inference should be drawn from his exercise of that right. Compare 118 F.3d at 325, with Pet. App. 31.

Petitioner finally asserts that the court of appeals improperly "used" the jury's split verdict "as a way to find harmless error." Pet. 21. The split verdict, however, was a subsidiary factor in the court of appeals' harmless-error analysis. The court of appeals noted that the split verdict "supported" its conclusion that "the jury heeded the[] instructions and was not inflamed by the prosecutor's comments." Pet. App. 31. But it had

reached that conclusion through a consideration of other factors—namely, that the prosecutor's "comments were more an isolated remark than a call for the jury to focus on the fact that defendants did not testify," that the district court gave an immediate curative instruction, and that the jury was twice instructed not to draw adverse inferences from a defendant's silence. *Ibid.*; see *Zafiro* v. *United States*, 506 U.S. 534, 540 (1993) ("[J]uries are presumed to follow their instructions.") (citation omitted).

Petitioner cites a handful of cases in which courts have concluded, in different factual circumstances, that a split verdict corroborated a determination of prejudice by suggesting that a case was close. See Pet. 21-22, 24 (citing *United States* v. *Van Eyl*, 468 F.3d 428 (7th Cir. 2006); *United States* v. *Simtob*, 901 F.2d 799 (9th Cir. 1990); *United States* v. *Burse*, 531 F.2d 1151 (2d Cir. 1976)); see also *United States* v. *Kallin*, 50 F.3d 689, 695 (9th Cir. 1995) (split verdict was "ambiguous") (cited at Pet. 20-21, 24); McMillan Br. 7-8, 10. But in those cases, like this one, the split verdict was one factor among many; and in those cases, *unlike* this one, the additional factors weighed against a determination of harmlessness. See *Van Eyl*, 468 F.3d at 438 (error was "powerful and persuasive" and substance of government's evidence was weak) (citation omitted); *Simtob*, 901 F.2d at 806 (error had "extraordinary dramatic and inferential power" and attempted curative instruction was insufficient); *Burse*, 531 F.2d at 1155 (error included numerous impermissible statements during closing argument and substance of government's evidence was weak). Context-dependent variations in the significance assigned to a single factor of the harmless-error analysis, which in each case involves the "case-specific application

of judgment, based upon examination of the record," do not warrant this Court's review. *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1705 (2009) (citing *Kotteakos* v. *United States*, 328 U.S. 750, 760 (1946)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2010

ORIGINAL (3)

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No. 10-85

In The
Supreme Court of the United States

BARRY SCHEUR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For the Fifth Circuit**

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI BY ROBERT McMILLAN

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QUESTION PRESENTED

None of the defendants testified at trial. In rebuttal closing, the prosecutor gestured toward the defendants, raised his voice and said, "[n]ot one of these defendants has stepped up and admitted they did anything wrong." The jury deliberated for over two days, stated that they were having difficulty reaching consensus, and rendered a split verdict along with a note that said, "we do hope (and some of us pray) that we have not done wrong by the defendants, the people of the United States, or this court."

Accordingly, the question presented is whether a prosecutor's comment on defendants' decisions not to testify may be deemed harmless by the appellate court when the trial court found that this was a close jury case in which the prosecutor's comment may have been prejudicial.

PARTIES TO THE PROCEEDING

Petitioner, Barry S. Scheur, and respondent, Robert McMillan, were co-defendants at trial and appellants in the Fifth Circuit. Robert McMillan separately filed a Petition for a Writ of Certiorari that has been docketed as No. 10-5263.

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RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Robert McMillan respectfully supports Barry Scheur's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 600 F.3d 434.

JURISDICTION

The judgment of the court of appeals was entered March 11, 2010. The petitions for rehearing *en banc* were denied April 12, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Barry Scheur's Petition for a Writ of Certiorari was docketed on July 15, 2010. This response in support of the petition for a writ of certiorari is timely under Supreme Court Rule 12(6).

STATEMENT

I. THE DISTRICT COURT PROCEEDINGS.

In November 2005, Scheur and others were indicted for mail fraud and conspiracy. In February and August 2006, superseding and second superseding indictments were filed. The indictments alleged that defendants fraudulently misstated the financial position of The Oath, a Louisiana health-maintenance

organization, on statements filed with Louisiana Department of Insurance (LDOI) in 2000 and 2001. In April 2007, the district court dismissed the indictments under *Cleveland v. United States*, 531 U.S. 12 (2000), because they failed to allege that anyone other than the LDOI was defrauded. On April 27, 2007, a third superseding indictment was issued. The district court denied defense motions to dismiss.

A jury trial was held in April and May 2008. There was conflicting testimony regarding the propriety of the transactions at issue. Witnesses testified in defendants' favor on the legitimacy of assets claimed in The Oath's financial statements, Louisiana's statutory accounting rules, and the discretion of the LDOI to permit reporting of assets at variance with National Association of Insurance Commissioners' guidelines.

In rebuttal closing, the prosecutor stated that "*this case was about lying on the financial reports to stay in business and that's where we're going to start.*" He then turned toward the three defendants, raised his voice, gestured at them, and stated, "*not one of these defendants is stepping up and saying that they did anything wrong.*"

Defendants moved for a mistrial. The court denied the motions. The court attempted a curative instruction. After the instruction, the prosecutor stated: "*what I meant to say was here is that there is blame being pla[c]ed at the face of*

everybody in this courtroom but there's no responsibility at all being taken on behalf of the defendants."

The jury deliberated for well over two days and wrote multiple notes to the district judge indicating that they were having difficulty reaching consensus. The jury ultimately found Scheur guilty on eight of fourteen counts. The verdict was accompanied by a typewritten note stating that "we do hope (and some of us pray) that we have not done wrong by the defendants, the people of the United States, or this court." The court questioned each juror *in camera* regarding the note's creation. Jurors' *in camera* comments further indicated that they had difficulty reaching a verdict.

In a published opinion granting the defendants bail pending appeal, the district court recognized that this was a close case in which the prosecutor's comment on defendants' silence may have been prejudicial. *United States v. Scheur,* 626 F.Supp.2d 611 (E.D. La. Jan. 7, 2009). In a case such as this, where the jurors deliberated for several days, sent a number of written notes to the court seeking clarification and expressing difficulty in reaching agreement, and then ultimately rendered a split verdict, the prosecutor's remarks present an additional substantial issue on appeal.

II. THE FIFTH CIRCUIT'S OPINION.

The Fifth Circuit affirmed the district court in all respects. Concerning the prosecutor's comments, even assuming they were improper, the Fifth Circuit found the error to be harmless. It supported this conclusion by noting that the jury rendered a split verdict, and thus could not have been "inflamed" by the prosecutor's remarks. This conclusion was the opposite of that reached by the district court in its order granting bail pending appeal because the split verdict reflected the closeness of the case, and presented a substantial issue on appeal. Scheur, however, never argued that the comment "inflamed" the jury; rather, he argued that the comment may have caused an impermissible inference to influence conviction on some counts.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S OPINION ILLUSTRATES THE INCONSISTENT APPLICATION OF *GRIFFIN V. CALIFORNIA* AND THE HARMLESS ERROR RULE.

A. Prosecutorial Comment On A Defendant's Decision Not To Testify.

In rebuttal closing, the prosecutor gestured emphatically toward defendants, raised his voice and stated: "*Not one of these defendants is stepping up and saying that they did anything wrong.*" The district court denied defendants' mistrial motions and immediately gave burden of proof and presumption of innocence instructions. The court did *not* immediately give a curative Fifth Amendment

instruction that no adverse inference may be drawn from a defendant's decision not to testify. After the instruction, the prosecutor continued: "What I meant to say was here is that there is blame being pla[c]ed at the face of everybody in this courtroom but *there's no responsibility at all being taken on behalf of the defendants*."

This Court long ago held that a prosecutor's "comment on the refusal to testify is a remnant of 'the inquisitorial system of criminal justice,' which the Fifth Amendment outlaws." *Griffin v. California*, 380 U.S. 609, 614 (1965) (internal citation omitted). "Prosecutors are prohibited from commenting directly or indirectly on a defendant's failure to testify in a criminal case." *United States v. Johnston*, 127 F.3d 380, 396 (5th Cir. 1997). However, the implementation of *Griffin* by the lower courts has led to a body of case law in which the line between what constitutes an impermissible comment and what does not is unintelligible. *Compare United States v. Roberts*, 119 F.3d 1006 (1st Cir. 1997) (reversal under plain error standard due to prosecutorial comment on defendant's silence at trial); *United States v. Tenorio*, 69 F.3d 1103 (11th Cir. 1995) (reversal due to prosecutor's comment on post-arrest silence); *United States v. Kallin*, 50 F.3d 689 (9th Cir. 1995) (same); *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993); *Ben-Yisrael v. Davis*, 431 F.3d 1043, 1050 (7th Cir. 2005); *with United States v. Rutkowski*, 814 F.2d 594, 597 (11th Cir. 1987) ("there is no explanation for

anybody being on that plane" held not improper); *United States v. Watkins*, 811 F.2d 1048, 1412 (11th Cir. 1987) ("why then could not the defendant say 'well, that's not me on the tape'" held not improper).

Here, the prosecutor chastised "these defendants" for failing to "step up" and "take responsibility" for the alleged crime, yet the Fifth Circuit did not find it reversible error. Conversely, in *United States v. Bates*, 512 F.2d 56 (5th Cir. 1975), the Fifth Circuit reversed on plain error review based on a prosecutor's statement that "[y]ou didn't hear from the culprit." *Id.* at 58. The prosecutor's comments in this case were equally clear, and calling for reversal. As in *Johnston*, the prosecutor made the error worse with his raised voice and gestures toward the defendants. *See Johnston*, 127 F.3d at 397 (prosecutor made "sweeping arm gesture indicating the individuals seated at counsel tables").

B. The Harmless Error Rule: Contradictory Interpretations Of The Meaning Of A Split Verdict.

The "harmless error" rule has become a method for troublesome cases to be disposed of without addressing the merits of a defendant's argument. As stated long ago by Judge Goldberg: "The *Chapman* harmless error rule was not intended to be a cover-up for every prosecutorial error . . . We must be careful lest the purgatory of the harmless error doctrine erode our sacred constitutional rights." *United States v. Hammond*, 598 F.2d 1008 (5th Cir. 1979) (citing *Chapman v.*

California, 386 U.S. 18 (1967)). The rationales that courts can use to declare an error harmless are virtually limitless.

Here, the Fifth Circuit took the very facts that the district court held illustrated the case was *close*—lengthy deliberations, jury notes expressing difficulty reaching consensus, and a split verdict—and held that they illustrated *the opposite—i.e.*, that the split verdict illustrates the prosecutor's comment was harmless. This was easy enough to do, since there is virtually no limit to the rationales on which an error can be declared harmless, even where case law is directly contrary. *United States v. Kallin,* 50 F.3d 689, 695 (9th Cir. 1995) ("[t]he partial acquittal indicates that the government's case was not definitive and that the jury's consideration of the impermissible inference may have been a factor resulting in conviction on some counts.").

An error is harmless only because the court of appeals says it is. The district court found that the split verdict indicated the closeness of the case, thus heightening the chance that the prosecutor's comments prejudiced defendants. Under Fifth Circuit precedent, it is well settled that "a prosecutor may not comment directly or indirectly on a defendant's failure to testify." In a case such as this, where the jurors deliberated for several days, sent a number of written notes to the court seeking clarification and expressing difficulty in reaching

agreement, and then ultimately rendered a split verdict, the prosecutor's remarks present an additional substantial issue [on appeal].

The trial court heard the evidence and interpreted the split verdict as an indication of a close case in which the risk of prejudice from the prosecutor's remarks was heightened. The Fifth Circuit used it as a way to find harmless error. This contradicts jurisprudence in that and other courts. *See United States v. Garza,* 608 F.2d 659, 665-66 n.6 (5th Cir. 1979); *Dugas v. Coplan*, 428 F.3d 317 (1st Cir. 2005); *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993); *United States v. Simtob,* 901 F.2d 799, 806 (9th Cir. 1990); *United States v. Harding,* 525 F.2d 84, 87 n.7 (7th Cir. 1975); *United States v. Caro-Quintero*, 769 F. Supp. 1564 (C.D. Cal. 1991); *United States v. Burse,* 531 F.2d 1151, 1155 (2d Cir. 1976) ("in an admittedly close case such as this, prosecutorial misstatements take on greater importance"); *United States v. Van Eyl,* 468 F.3d 428, 438 (7th Cir. 2006).

The Fifth Circuit further buttressed its "harmless error" finding by stating that "the district court gave an immediate curative instruction that the Government bore the burden of proof and that the defendants need not testify or prove anything." The Court cited *United States v. Lampton*, 158 F.3d 251, 260 (5th Cir. 1998) for the assertion that "such an instruction cures any alleged harm from the prosecutor's improper remarks." However, *Lampton* does not include the text of the instruction given there, nor does it state whether the defendant objected in the

trial court or on appeal to the court's failure to instruct that *no adverse inference may be drawn from defendant's decision not to testify. Id.*

Here, defendants expressly objected that the curative instruction was insufficient for that reason, citing *United States v. Griffith*, 118 F.3d 318 (5th Cir. 1997). In *Griffith*, as here, the "curative" instruction addressed the burden of proof and the presumption of innocence, but it *did not say that no adverse inference could be drawn from the defendant's silence.* The "curative" instructions here and in *Griffith* are substantively identical. *See Griffith*, 118 F.3d at 324. Yet in *Griffith*, the Fifth Circuit conducted plain error review, and stated that "we conclude without difficulty that the district court erred by failing to instruct on the Fifth Amendment privilege." *Id.*

The Fifth Circuit noted:

> [T]he district court failed in its obligation to correct the error . . . the district court reminded the jury that Griffith was presumed innocent and that the government had the burden of proving him guilty beyond a reasonable doubt.
>
> *The court neglected to tell the jury that Griffith had a constitutional right not to testify, and that his exercise of that right could not be held against him.*

118 F.3d at 325 (emphasis added). The Fifth Circuit held that "the error was plain" and stated:

> The proper remedy should have been as obvious as the initial constitutional error; *a Fifth Amendment violation calls for a Fifth Amendment instruction. Instructions on the burden of*

> *proof and presumption of innocence are no substitute for [an] explicit instruction on the Fifth amendment privilege.*

118 F.3d at 325 (emphasis added) (internal quotation marks omitted).

Here, the Fifth Circuit ignored precedent and found the error harmless on the basis of a curative instruction that constitutes plain error under that court's own jurisprudence. The trial court heard the evidence and expressly found that the split verdict illustrated *the closeness of the case*, thus *heightening* the chance that the prosecutor's comments prejudiced defendants. The trial court's conclusion is consistent with precedents in the Fifth Circuit and other courts. *See United States v. Garza*, 608 F.2d 659, 665-66 n.6 (5th Cir. 1979) ("The jury apparently found the case quite close despite the prosecutor's improper attempts to influence it. It took eleven hours for the jury to reach a verdict."); *Kallin*, 50 F.3d at 695 ("The partial acquittal indicates that the government's case was not definitive and that the jury's consideration of the impermissible inference may have been a factor resulting in conviction on some counts."); *United States v. Burse*, 531 F.2d 1151, 1155 (2d Cir. 1976) ("in an admittedly close case such as this, prosecutorial misstatements take on greater importance").

The lack of standards for declaring an error harmless allowed the Fifth Circuit to turn the trial court's finding on its head. The circuit court held that the split verdict showed not *the closeness of the case*, but rather that the jury "was not inflamed by the prosecutor's comments" and thus "the prosecutor's comments

failed to rise above the level of harmless error." By this logic, the defense would have been better off if Scheur had been convicted on all counts. Of course, if that had occurred, the court simply could have said that the unanimous verdict illustrated the overwhelming evidence of guilt, thus rendering the error harmless. *Johnston*, 127 F.3d at 380 (5th Cir. 1997) (error is harmless as to defendants against whom evidence was overwhelming). Heads, the government wins. Tails, the defendant loses. This will always be the case absent a clear limitation of the harmless error rule.

CONCLUSION

Barry Scheur's petition for a writ of certiorari should be granted.

Respectfully submitted,

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